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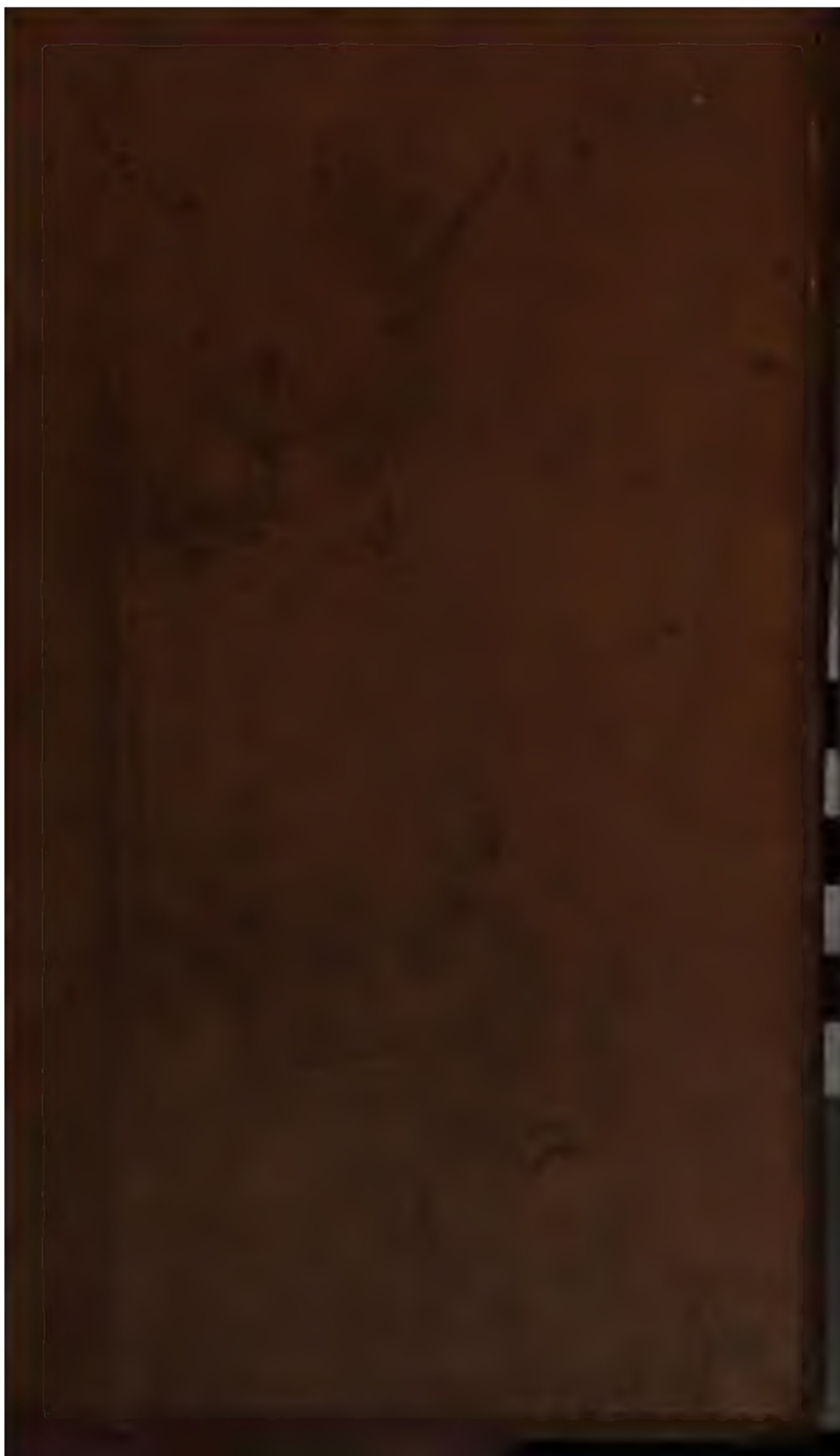
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INSTITUTES

OF THE

LAWS OF HOLLAND.

SHACKELL AND BAYLIS, JOHNSON'S-COURT.

40
14. 1829.
INSTITUTES
OF THE
LAWS OF HOLLAND,

BY
JOHANNES VAN DER LINDEN, LL.D.,
AND
JUDGE OF THE COURT OF FIRST INSTANCE AT AMSTERDAM.

AMSTERDAM:

PRINTED IN THE YEAR 1806,

AND NOW TRANSLATED BY ORDER OF THE

RIGHT HONOURABLE

THE EARL BATHURST,

LATE

HIS MAJESTY'S PRINCIPAL SECRETARY OF STATE

FOR THE COLONIES,

BY J. HENRY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTER AT LAW,

AND

**SENIOR COMMISSIONER OF LEGAL INQUIRY INTO THE
ADMINISTRATION OF JUSTICE IN THE WEST
INDIAN AND SOUTH AMERICAN COLONIES.**

LONDON :

**PRINTED FOR J. AND W. T. CLARKE, PORTUGAL STREET,
LINCOLN'S-INN-FIELDS ; J. M. RICHARDSON,
CORNHILL ; AND J. RIDGWAY, PICCADILLY.**

1828.



DEDICATION.

TO THE

RIGHT HON. THE EARL BATHURST, K.G.

&c. &c. &c.

MY LORD,

YOUR Lordship having been pleased to encourage and assist, by your especial patronage and support, while Secretary of State for the Colonial Department, the Translation of the following Work, it would seem not to require any apology on my part in dedicating it to your Lordship. But even had this not been the case, and that gratitude and the various colonial appointments that I have held under the Crown through your Lordship's recommendation, did not urge me to this Dedication; still I should feel, in common with

others, that the uniform and liberal encouragement afforded by your Lordship during the many years you filled your high and arduous office, to every measure that could tend to render the administration of justice in His Majesty's Colonies more efficient, and the unremitted labour you bestowed to accomplish this great object, would alone point out your Lordship as the person to whom such a work should be dedicated.

That the Commission of Inquiry into the Administration of Justice in the West Indian and South American Colonies, instituted by your Lordship while Secretary of State, and of which you did me the unsolicited honour of placing me at the head, may effect, at least in some degree, your benevolent intentions, no effort shall be wanting on my part ; and whether it succeed or fail, your Lordship will, at least, be justly entitled to the credit of having originated, during your administration of these important interests, a measure which has the singular felicity, in a colonial question, of there being but one opinion with respect to its fitness

and propriety: and which, if judiciously followed, is regarded by those whose judgment is uninfluenced by any considerations either of party or interest, as the most likely means to secure the permanent tranquillity, prosperity, and attachment of our Colonies.

I have the honour to be,

My Lord,

With the greatest sense of obligation,

Your Lordship's most sincere

And obedient Servant,

JABEZ HENRY.

1

PREFACE

OF

THE TRANSLATOR.

I WAS encouraged to undertake this Work in the year 1824, by the recommendation of Sir W. Grant, who expressed to me that he had frequently (while presiding as Master of the Rolls, on the hearing of Plantation Appeals in the Privy Council) felt the want of such a book of reference on Dutch Law, as it prevailed in the Dutch ceded Colonies ; and he was further pleased to give me his express permission to communicate this to the Right Honourable the Earl Bathurst, His Majesty's then Secretary of State for the Colonies, who immediately thereon authorized me to commence this Translation, under his patronage and support.

The circumstance of His Majesty having, soon afterwards, been pleased to appoint me his Senior Commissioner in the Commission of Legal Inquiry into the Administration of Criminal and Civil Justice in his West Indian and South American Colonies, has in some degree retarded the execution of this Work ; but if it has been productive of delay in this respect, it has, however, afforded me the means, in my character of Commissioner, of again visiting the Colonies of Demerara and Berbice, and of materially profiting thereby in my Translation.

I have, likewise, since my return to Europe from executing my commission, made a journey to Holland, for the express purpose of consulting the learned author himself on several points which I considered of importance, and in order to assure myself of the general accuracy of the Translation ; and he was so kind as to afford me every assistance and explanation.

A Translation of this Work had been previously made and published, in the year 1814, at Demerara, by Mr. Van Braam, since deceased, in which, considering the disadvantages he laboured under, of not being a native of the

country into whose language he undertook to render the Work, or familiar, by a legal education, with its forensic and technical terms, it is surprising that he has succeeded so well ; but, as his Work has been for some years out of print, and scarcely a copy (as I am informed) can be procured, either here or in the colonies, this circumstance alone would seem to render a new Translation, in which the want of technical precision in the former, and its inaccuracies of language should be attempted to be corrected, desirable.

The Translation of Van Leeuwen's work on Dutch Law, termed *Roomsch Hollandsche Recht*, published at London some years since, under the auspices of the Earl Bathurst, appears to have been made at Ceylon, and evidently by a person but little acquainted with either the English law or language, as it labours under both the defects to be found in Mr. Van Braam's Translation, and in a much more considerable degree. It is besides subject, from the antiquity of the work itself,* to the very

* Simon Van Leeuwen was the author of several useful works on the laws of Holland, among which, that termed the *Censura*

serious objection of its being no longer a safe book of reference, however valuable at the time : as neither the subsequent changes in the law of Holland, nor additions thereto during the last century, appear to have been brought up, or even noticed, in the shape of notes or otherwise ; but it might perhaps have been sufficient to have referred the reader to what Mr. Van der Linden himself says on this subject in his preface.

It may here be proper to observe, that the ancient law of Holland, as it existed before the subjugation of that country to France, and the introduction of the *Code Napoleon*, still prevails in the Dutch ceded Colonies, which never admitted the new code, from the circumstance of their being, during the war which preceded the short peace of Amiens, and the treaty of Paris, under the dominion, by conquest, of Great Britain.

Mr. Van der Linden has, fortunately for these

Forensis deserves to be particularly noticed : he also published a valuable edition of the *Corpus Juris*, and a very useful little work on the practice or manner of proceeding in criminal and civil cases. His notes also on *Grotius's Introduction to the Law of Holland* are very learned. He died at the Hague, in the year 1682.

Colonies, where his name is justly of very high authority, brought up in his valuable work, the ancient law of Holland, as it is to be found in the works of Grotius, Van Leeuwen, Voet, and Bynkershoek, to the period of 1806; five years after which, viz. in the year 1811, it was superseded, in his native country, by the *Code Napoleon*.

With respect to the utility of this work of Mr. Van der Linden, appearing in an English dress, and rendered at least intelligible to the numerous English settlers, in the Dutch Colonies, by the use of forensic terms, to which, from their English education, they are enabled to affix a precise sense and meaning, I trust little need be said; the more especially, when it is considered that by the terms of the capitulation of these colonies, their ancient laws and institutions were secured to them: and that it must be matter of considerable interest, in proportion to their wealth and relations to Great Britain, the vast extent of British capital therein, and the great number of settlers from this country, that these settlers and capitalists should have the means of knowing, without a blind

dependence upon foreign lawyers, what are the laws which are to decide, not only upon their valuable property and investments, but even their lives.*

The notes which I have added to the Translation, with some queries as to points of difference which exist between the laws of Holland and England, and which must be expected to occur in cases arising from mortgages, and other contracts, as well as in inheritances and descents, were principally suggested by my practice in appeals in the Privy Council, since my resignation, in the year 1816, of the office of President of Demerara and Essequibo, after holding it three years. And as it has now become my duty to report on the Colonies of Demerara, Essequibo, and Berbice, as the sole surviving Commissioner to those Colonies, by the death of my lamented colleague (Mr. Coneyo), much that is important relative to the present state of their laws and institutions, and the practice of their courts, will be found in the Appendix to that report.

* On my first return from Demerara, in the year 1816, I translated, by the desire of Earl Bathurst, the Criminal Code in force there, and it will be found in the Appendix to my report on that Colony, with suggestions for its reform.

I have only now to add, that to those who wish to acquire a competent knowledge of the civil law, to qualify them to hold judicial appointments in our foreign Colonies,* this work of Mr. Van der Linden's will be found, from his constant references to that law, and the precision, clearness, and simplicity, with which he develops its first principles, a very useful and easy introduction ; and the English student, with very little application, will be enabled to distinguish in this Work, that which is *law*, as a pure and abstract science, founded on the first principles of natural justice common to all civilized nations, from that which is more special and municipal ; and having done this, he will then be in a state to commence, with a greater prospect of success, the more arduous study of the laws of his own country, in the Commentaries of

* To those who, with a higher ambition, wish to penetrate deeper into this science, the books whose titles are enumerated by the learned author, in his plan of a select Law Library, given in the introduction, will be found more than sufficient. The greater part of these valuable works, and of the choicest editions, were once in the possession of the Translator, at the cost of nearly a fortune ; but they were lost, with almost every thing else he possessed, by shipwreck, on their passage to Corfu.

Blackstone—unfortunately now, from the numerous changes in the statute law, since his time, additions, and the notes necessary to explain them, become a *digest*, instead of what it ought to be—a *manual*; and sufficient, from its size, to terrify the stoutest student.

However, it may now reasonably be hoped from the labours of Mr. Peel, the first Hercules who entered this Augean stable, and the disposition created by his successful example to simplify our laws, *civil* as well as criminal, that the reproach of Tacitus,—“*Plurimæ Leges Corruptissima Respublica*,” will no longer be ours.

JABEZ HENRY.

Middle Temple, March 10th, 1828.

ADVERTISEMENT.

As the abbreviations used by the learned Author in his numerous references to the several texts or parts of the Civil Law, and other authorities, throughout this Work, cannot be expected to be familiar to the English reader, the following explanations of the most difficult of them is hereunder given by the Translator, in order to render the notes of the Author more intelligible. And as the Translator has further had occasion to observe, that one very serious discouragement to young students in the study of the Civil Law is, the difficulty of referring to the several texts cited by the commentators or doctors, who seldom notice more than the first

words of the law to which they refer, and this even in an abbreviated form; to remove in some degree this difficulty, the Translator has subjoined a list of the several heads or titles of the Civil Law, by reference to which any particular text may be easily found.

ABBREVIATIONS.

ICtus.—Juris Consultus.

L. B.—Lugduni Batavorum (Leyden).

Traj.—Trajectum Rheni.

D. or Deel.—Volume or Chapter.

Gr. Pl. B.—Groot Placaat Boek, (or Statute Book of Holland.)

ff.—The Digest, or that part of the Pandects containing the selected opinions of the most celebrated Roman lawyers, on cases submitted to them, and which form fifty books of the Justinian Code.

C.—The Codex, or Twelve Books of positive Law, emanating from the Emperors, as *Rescripts*, or Answers to Cases submitted by the Governors or Presidents of the various Provinces of the Empire.

I.—The Institutes of the Roman Law, framed, by order of Justinian, for the use of Students.

N. or Nov.—The Novellæ, or subsequent Laws of Justinian.

E.—Edicta, or Edicts of Justinian.

N. J.—Novellæ Justini.

C. T.—Constitutiones Tiberii.

C. J. J.—Constitutiones of the Emperors Justinian and Justin.

L.—Leonis Novellæ, or Laws of the Emperor Leo.

C. I.—Constitutiones Imperiales, or of the more modern Greek Emperors.

f.—Feudorum Consuetudines.

Pand.—The Pandects.

L.—The Liber, or Book of the Pandects.

t.—The titulus, or special chapter of the book.

L. or l.—The *Lex*, or special part of the chapter, which is always quoted by the incipient words, and in italics.

d. t.—dictus titulus, or special chapter above mentioned.

d. l.—dicta lex, or law above-mentioned.

d.—dicta, or dictum.

D. D.—Doctores.

gl.—gloss or comment.

J. N. G. et C.—Jus Naurale, Gentium, et Civile.

PREFACE
OF THE
AUTHOR TO THE READER.

THE circumstances which led to my composing the following Work, were shortly these. The late Jacob Loveringh, bookseller, had, a considerable time since, published a small work under the head of the *Civil, Judicial, Notarial, and Mercantile Guide*, which ran through three editions, the last of which was printed in the year 1761. Mr. John Allart, the bookseller, who possessed the entire copyright of the work, which was then out of print, was desirous to print a new edition, and requested of me to undertake to correct and enlarge it. I accordingly perused the work, with this view, and I found, very soon, that however praiseworthy the

object of the writer, the execution of the work was a miserable failure; the definitions were, for the most part, very inaccurate; the expressions in many places obscure, and even sometimes unintelligible; in many parts, also, it was incomplete, and in others, again, redundant.

Besides, the quotations or references to authorities, were far from being accurate.

That the opinion I formed of this work was not too severe, but that, on the contrary, it was very just, I had every reason to believe, as I afterwards found it confirmed, on taking up the "*Netherland Letter Courant of E. Luzac (4th Volume, page 324 et seqq.)*" in which there is a review of this work, which sufficiently corresponds with the preceding remarks.

I therefore informed the bookseller, that on examination of this little work, I had found its execution to be such that, to speak candidly, I could not make a good work of it, and must therefore decline the undertaking.

Nevertheless, the reading of this little book gave me reason to think that a work of such a nature, provided it were well executed, might prove very useful; and that in fact there was

no such book: since the *Introduction to the Law of Holland*, by Grotius (*Inleiding tot de Hollandsche Rechts-geleerdheid van H. De Groot*), however invaluable, is, for persons not skilled in the law, much too obscure; and besides, it does not comprehend every head of the law.

The Dutch Roman Law of S. Van Leeuwen, (*Romsch-Hollandsche Regt. S. Van Leeuwen*), which formerly was much in use in order to acquire a universal knowledge of our law, is so far removed from the more polished taste of our age, that although it is in fact still a good book, it is no longer adapted for its object.*

The attempts of this kind made by others tend more to mislead the uninformed than to assist them, and do not deserve to be here noticed.

From these and other considerations, I felt

* Besides the objections stated above, the length of time which has elapsed since the work was first published, a period of above one hundred and fifty years, forms a very serious one to it, considering the many changes which have been made in the laws of Holland during that time, especially with respect to marriage.

myself encouraged to try my own powers in the composition of such a work; and instead of editing an old work, whose defects I could never perfectly remedy, I finally resolved to produce an entirely new book on the subject.

In the following Work, I have treated of the general principles of the whole body of our existing law and practice, confining myself, however, especially to this law and practice as it exists in the Department of Holland: since, to blend therewith the special laws of the different provinces, which differ so widely from each other, would have produced nothing but a confused and imperfect whole.*

However, notwithstanding this, as the first principles of Law are for the most part every where the same, I am from this circumstance encouraged to hope that this Work will be found useful throughout the whole of the provinces.

* The *Differentiæ Juris Romani et Belgici* of Professor Voorda, and the *Institutiones Juris Belgici Civilis* of Professor Arntzenius, although they contain much good matter, shew clearly how impossible it is to comprehend, in one system, laws which have so different an analogy.

As my especial object in this Work was to write for the benefit of those who, although unlearned in the law, are nevertheless anxious to acquire a general idea of law and practice, so far as they are founded on general principles, I have for this reason endeavoured to express myself in a clear, easy, and accurate manner; and although it was not my object, nor was it possible to comprise every head, both of law and practice, in one octavo volume, yet I flatter myself that I have laid down all the principles so fully, that he who understands them clearly, and applies them correctly, may of himself resolve many points: at least, he will have opened to himself the way to enter with advantage upon a more profound research.

By the means of short notes, I have also, on all occasions, supported my positions by the best authorities; and I shall feel very much disappointed, if even those who are more versed in this study do not herein meet with something which may deserve their attention.

The order which I have observed in this Work is shortly this:—

After an Introduction, wherein I lay down the necessary rules for the commencement of the study of the law, as well as for the formation of a Select Law Library, I divide the Work into four Books. The first treats of the Municipal Civil Law ;—the second, of the Criminal Law ;—the third, of the Practice or Manner of Proceeding both in Civil and Criminal Cases ; and, the fourth, of the Laws relating to Commerce.

To all which, I have added a very full index.

Speaking of myself, so far as regards the execution of this Work, I must say, that I have brought it to a conclusion at least with satisfaction and advantage to myself, since this labour has been the means of refreshing my recollection of the first principles of every head of law and practice. I am far from entertaining the vain idea that this Book is above criticism ; but yet, I think I may flatter myself that it is well adapted, in the first place, to serve as a guide for those who, without any previous legal study, are obliged, by circumstances, to practice as lawyers.—2. For those students who, on leaving the University, proceed to the bar ; and

finally, for those individuals who are desirous, at least in some degree, to see with their own eyes what is or is not agreeable to the principles of law and practice. If my labours effect this object, I shall never lament the time employed in this Work.

May the Reader profit by it, and farewell.

J. VAN DER LINDEN.

Amsterdam, 20th October, 1806.

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INTRODUCTION,
CONTAINING
THE NECESSARY INSTRUCTIONS
FOR THE
COMMENCEMENT OF THE STUDY OF THE LAW,
AS WELL AS THE FORMATION OF A
SELECT LAW LIBRARY.

CHAPTER I.

On the Commencement of the Study of the Law.

SECT. I.

ALL those who are desirous to apply themselves to the study of any science, of whatever nature it may be, ought to adopt, as an universal rule, the necessity of acquiring a knowledge of its first principles, and making themselves perfectly masters of these, before they enter upon the study of more extensive works or

**General
Rules.**

General Rules. treatises on controversial points relating to this science.

The student who proceeds otherwise, and neglects the first principles of the science, will never acquire a fundamental knowledge of it, or be in a state to handle or resolve points of controversy on solid grounds;¹ and if this be true of all sciences in general, it is peculiarly so with respect to the law: for, in innumerable instances, the simplest principles of law are sufficient to decide the most difficult questions; and he who is ignorant of these principles, or knows not how to apply them, reasons always at random, and can never succeed in solving an intricate question.² Which way, then, it may be asked, is it best to proceed in order to acquire this fundamental knowledge of law, and what books are to be studied for this purpose?

To answer these two questions is the object of this Introduction.

SECT. II.

Fitness for this Study. The first point which comes into consideration, is the personal aptitude or fitness of the student to become a good lawyer.

¹ H. GROTII et aliorum, *Dissertationes de Studiis Instituendis*. (L.B. 1645, in 12mo.)—E. SCHEIDII *Opuscula, de Ratione Studii* (L.B. 1792. Three vols. 8vo.)

² C. G. BUDER, *Selecta Opuscula de Ratione ac Methodo Studiorum Juris*. (Jenæ, 1724, in 8vo.)

Besides the universal requisites to the successful study of any science, there is a certain special character or disposition necessary to enable a man to become a good lawyer.¹ The study of this science is, from its nature, frequently dry and fatiguing; he should then be patient and laborious. The just application of principles to special cases is the true sign of a good lawyer; he must therefore be possessed of a clear and sound judgment.

Fitness for
this Study.

The grand object, in the conduct of every cause, being to render to every one his own, he ought therefore to be a man of honour and principle.²

The great variety and difference of cases, and the daily intercourse of the advocate with all descriptions of persons, requires in him a knowledge of mankind. Furthermore, as his duty requires that he should represent to the judge the interests of his clients, in a proper manner, eloquence is an important requisite.

An indolent or impatient man, or one who is deficient in judgment, or a man of a light or bad character, or one who is ignorant of the world, or who is not able to express himself clearly—let

¹ CICERO, de Offic. lib. ii. cap. 19. “Omnes non possunt de multi quidem, Jurisperiti esse.”

² J. C. RUCKER, Oratio de vero .Cto, Viro bono. (L. B. 1758.)

Fitness for this Study. such entirely abstain from the idea of becoming a lawyer.¹

SECT. III.

**Prepara-
tory Stu-
dies.**

In addition to the personal fitness above-mentioned, there must also be a real fitness for this study—that is, the student must come prepared with all that previous knowledge or learning by a course of preparatory studies, without which, a fundamental knowledge of law, as a science, is not to be attained.

On the one hand, the preparatory studies should not be carried so far as to consume half the time of the academical course before the student enters upon the principal study, that of the law ; but on the other hand, he should not enter on it before he has enabled himself thoroughly to comprehend and understand that which he has to study.

We shall therefore class the preparatory studies under the following heads:—First. A thorough knowledge of the Latin language.—This is the true key to all learning ; and although it is not given to every one to be a Muretus, an Ernesti, a Rhunkenius, or a Wyttenbach, yet the want of a classical knowledge of this tongue is disgraceful to the otherwise meritorious scholar ; but to a lawyer this know-

¹ P. ROSCAM, Oratio, de præcipuis, que verum J. Ctum commendant, dotibus. (Traj. 1787.)

ledge is indispensable, since the Roman law is written in this language, and to the proper understanding of it, a knowledge of the Latinity of the ancient Roman lawyers is, above all, necessary.

Prepara-
tory Stu-
dies.

2. A sufficient knowledge of the Greek language to be able to consult, with advantage, when it is necessary, the *Paraphrase* of Theophilus, the *Basilica*, and the original text of the *Novellæ* of Justinian.¹

3. A knowledge of the Roman history and *antiquities*.

An acquaintance with the history of the Roman Republic, and that of the Emperors, is, to a lawyer, highly necessary, in order to determine properly what ancient laws have been repealed by subsequent ones.

By the Roman antiquities, we do not so much intend *mythology*, which is necessary to the understanding of the ancient poets, as that of the different political orders and institutions; the distinctions between the different offices, and powers, and authority, respectively annexed to them: also that of the persons who composed the court of the Emperors, with the solemnities requisite to those acts in law termed *legitimate*, or *Actus legitimi*, such as the manumissions of

¹ P. BONDAM, Oratio de Linguae Græcæ Cognitione J. Cto. necessaria. (Zutph. 1755.)

Prepara-
tory Stu-
dies.

slaves, the adoption of children, marriages, wills, &c.

4. A knowledge of the history of the Roman Law.

We here speak of *the Law of the Twelve Tables*; of the *Lex Julia, Cincia, Cornelia, Voconia*, and others; of Ulpian, Papinian, Paul, and other Roman lawyers; of the *Edictum perpetuum* of the prætor; of the sects of the *Sabinians and Proculeians*; of the *Codex Theodosianus*; of the collection of the *Corpus Juris*, by order of Justinian, &c.

How great then must be the advantage of that advocate over others who possesses this knowledge.

5. A general knowledge of philosophy, in which logic, or the art of separating true from false reasoning, ought to be particularly attended to.*

* The use of logic to an English advocate may be seen in the celebrated syllogism of Serjeant Parker, used to detect the fallacy of Dr. Sacheverel's answer to the second charge brought in against him by the Commons.

“Are, then, passages that speak of all false brethren, and that speak of some particular false brethren, independent? —My Lords, these are so far from being independent, and so ill have they chosen out what to find fault with, that (if your Lordships will pardon the pedantry, considering I have a man of logic to deal with) the two propositions are the propositions of a syllogism, concluding in the first figure; and the inference he complains of is the conclusion necessarily aris-

The *mathematics, or physics*, by which we acquire a sound mode of reasoning. Preparatory Studies.

Ethics, or moral philosophy, by which the universal duties of men and citizens are shewn.

6. Lastly, it is highly necessary that the student should not be ignorant of the modern languages.

The French and German merit particular consideration.

Without a knowledge of the former, no one can hold any converse with the polite world, and without the latter we are shut out from a number of learned works which Germany,

ing from them, according to the rules of logic. The whole syllogism runs thus :

“ All false brethren do in themselves weaken, undermine, and betray, and do encourage and put it in the power of others who are professed enemies, to overturn and destroy the constitution and establishment.

“ Persons of character and station are false brethren.

“ Therefore persons of character and station do, &c.

“ The two first propositions are what I have shewn the doctor plainly to lay down : the other only a necessary consequence.

“ Would any one expect that the doctor should be so forgetful of the rules of logic, as, when he had laid down the premises, to deny the conclusion ? or to deny the conclusion to be his doctrine who laid down those premises ? Can it be thought that he laid them down, without an intention that his hearers should make the conclusion ?—or could he think it possible they should not make it ?—or shall the suppressing a conclusion so plainly arising, which is taken notice of in some that write of logic as an elegance in discourse, pass for an excuse ?’ —(STATE TRIALS, vol. v. p. 820, 3rd edition, 1742.)—T.

Prepara-
tory Stu-
dies.

during the last fifty years, has produced on every branch of science.

An elegant knowledge of our own mother-tongue, as well as of the history of Holland and its constitutions, with its different changes from time to time, and its present state, is so indispensable to a lawyer as not to require any argument.

SECT. IV.

Study of
the Law.

The student being thus prepared to commence the study of the law, cannot fail, provided he pursues a proper course, to succeed.

For this purpose the following rules should be always borne in mind:—

1. The foundation of all knowledge of law as a science, must consist in the knowledge of the pure Roman law, as it is contained in the *Corpus Juris* of Justinian.

Let us go over every code of laws made in different states for some years, even the *Code Napoleon* not excepted, and we shall soon be convinced, that if the compilers of these modern codes had not availed themselves of the Roman law, their works would have been most defective.*

* In fact, more of the Roman law has been incorporated with the English common law, than the English reader may be willing to suspect or believe; but whole passages are to be found in Bracton and Fleta. The proceedings in our courts of equity seem entirely borrowed from it, and the very terms retained.—T.

2. He who would thoroughly understand the Roman law, must study it, as it were, pure, and place himself in the time of the ancient Romans, before the compilation of Justinian: nothing is more pernicious than, in the beginning of this study, to mix any thing of modern law with it.

Study of
the Law.

Each of these laws has its different analogy, which must not be confounded.

We, therefore, consider it an error to place a youth who is about to study law, previously in the office of an attorney or notary.

3. The study of law, then, as a science, must be commenced with the Roman law, and not with the law *of nature and nations*. The student, who has once become smitten with the latter study, will with difficulty be brought to the dryer reading of the Roman lawyers, and run the risk of making no great progress therein.¹

4. Although it is a certain truth, that those things which are still in force merit our attention, more than that which is ancient and ob-

¹ We must here differ from Professor BARBEIRAC, who, in his *Oratio de Studio Juris recte Instituendo*, thinks we should begin with the law of nature and of nations. His reasons certainly prove, that a lawyer should apply himself to the study; but to make it precede that of the Roman law, is to take the wrong road.

Study of
the Law.

solete, yet the student in Roman law should endeavour to acquire a competent knowledge of the different laws of slaves and freedmen, and of *manumissions*,* of *emancipation*, of the *bonorum possessiones*, and many others, without the knowledge of which a number of laws are incomprehensible;¹ although those laws which are still in force ought to be more specially studied.

5. The Roman law cannot be better learnt than from the sources of the law itself; the text of the Institutes must, therefore, be read and re-read.

The text of the *Pandects* also, particularly as arranged by Pothier, deserves the most careful study.

Finally, in case the law is studied from a manual, as is generally the case, the laws cited

* The knowledge of the Roman law of Manumissions is still necessary in the Dutch ceded colonies, where this law yet prevails, in order to supply many *casus omissi*; and, in fact, in such cases, it is commanded to be observed by an express statute of their High Mightinesses the then Sovereign of these colonies, (1774). Besides, the opinions of the Roman lawyers are so liberal and favourable to freedom on this head, that their application to cases in the colonies as they occur, under wills, &c., cannot be too much encouraged, as one safe step towards general emancipation. (See Translator's Tract on the Roman Law of Manumissions.)—T.

¹ D. G. Van der Keessel, Oratio, qua disquiritur, an capita illa Juris Romani, quæ in usu hodie non esse dicuntur, in Academiis doceri expediat? (Gron. 1762.)

in support of the principle laid down, and the proofs of it, must be carefully and narrowly referred to and examined at the same time; by this mode of study, a sound knowledge of law is acquired. Study of
the Law.

6. There is scarcely any science in which the overwhelming it with notes or commentaries is so detrimental as in that of the Roman law.

In the beginning, therefore, the student must confine himself to his manual, and to one, or at the most two, plain and succinct commentaries. Extensive works or treatises on disputed points are in the beginning highly prejudicial. We must first acquire the knowledge of what is clear and undisputed law, and that from fundamental rules and principles.

SECT. V.

Keeping these rules in view, we commence with the *Institutes* of Justinian, and must endeavour, as far as possible, to have the text by heart, learning the definitions and divisions from some manual; for which purpose, that of Böckelman or Westenberg is the best. Institutes.

At the same time the student should read, and compare with each lesson, the Greek *Paraphrase* of Theophilus, the *Antiquities* of Heineccius, and also his *Recitationes*. A light and clear commentary, such as Borcholtens, which

Institutes. I have found useful, being added to these, will be sufficient to occupy the student, particularly if he has the means of comparing with these, of an evening, the *Dictamina* of his professor, which he has heard in the morning; and thus bring the lecture back to his memory.

Extensive and profound commentaries, such as those of Vinnius and others, must not be ventured upon, till he has become familiar with the fundamental principles of the law, as contained in the *Institutes*.

But he must not be in a hurry to lay aside the *Institutes*; they are the foundation on which every thing rests; they must be read, gone through, and studied repeatedly; and when he is farther advanced, he may take up a more extensive commentary: for which purpose I recommend that of Rittershusius¹ above all others.

SECT. VI.

Pandects. The study of the *Institutes* being completed, or rather, before it is quite laid aside, the student may proceed to the *Pandects*, in the studying of which, the manuals used in college, may be the basis. Of these, Van Eck's,

¹ It is to be lamented, that the works of this truly great man are so scarce; and it is to be wished, that a general subscription might encourage one or more booksellers to publish an entire edition of his works.

or Alestenberg's, are the best, referring at the same time to the laws therein cited, reading and re-reading upon each title or head the *Pandects* of Pothier, the *Enarratio* of Schulting, and the *Commentaries* of Noodt and Wissenbach, and the *Prælectiones* of Huber, which are sufficient in the beginning. Pandects.

When the student has leisure, it would be very profitable to give some hours to the study of the *Jurisprudentia Ante Justinianæa* of Schulting; and, when he is a little farther advanced, to the *Observations* of Cujacius.¹ The treasure of true and genuine knowledge of Roman law that is contained in these two books is almost incredible.

For the student more advanced, it may be also useful, in respect of different heads of study, to consult occasionally the writers who have treated of these subjects particularly; for example, under the title *de Pactis*, to read Noodt *de Pactis et Transactionibus*; and on the seventh book of the *Pandects* he may consult Noodt *de Usufructu*; and under the head of wills, the

¹ We agree entirely with the opinion of GROTIUS, in *Dissert. de Stud. Instit.* p. 564. “Si percoctam sapientiam et nomen eximium optas, non aliunde Juris Quiritum cognitionem spera, quam ex CUJACIO, qui solus suffecerit. Adeo ille omnia istius studii arcana pervidit, et quibus é fontibus cuncta fluerent.” See also J. VALCKENAAR, *Oratio de Scholâ Cujacianâ*. (Francq. 1782.)

Pandects. *Interpretationes* of Averanius, a man who, in learning and critical knowledge, has scarcely his equal.*

The professors would do well, in their lectures on the *Pandects*, to point out on each head one or more of the best authors for the student to consult. We had almost forgotten to recommend to the more advanced student the *Commentarius ad Cod. Theodos.* of S. Gothofred.

SECT. VII.

**Contro-
versial
Points of
Law.**

We can scarcely dwell too long on the study of what is certain and indisputable law (*Jus Certum*), the ground of which being well understood, may serve to resolve the disputed points; and experience teaches us that half these points of controversy owe their origin to the ignorance or misapplication of its fixed principles.

However, when the student is become tolerably familiar with the *Institutes and Pandects*, but positively not before, as it would be a complete failure, it is time to apply himself to the study of the *Jus Controversum*, or disputed points of law. The *Introductio in Controversias Juris Civilis*, of Walchius, is an excellent manual on

* The translator must add his evidence of the pleasure he has derived from the very elegant and clear manner in which this author treats points of controversy and difficulty, and illustrates them by references to the classic authorities.—T.

this subject; the works also of Bachovius, Merenda, and others, afford great information; and then all this must be perfectly mastered, under the guidance of some skilful preceptor, by maintaining theses on the controverted points.

Contro-
versial
Points of
Law.

SECT. VIII.

This course of the Roman law is, for the academic student, in this respect, sufficient. However the course of the university carries it further, and is extended to other heads of jurisprudence, as—

Further
Studies.

1. The study of the law of nature; in which the introduction of Professor Pestel, and the writings of Grotius and Puffendorf, are the best to follow.

Law of
Nature.

2. Of the study of the law of nations, Grotius's Treatise on the Rights of War and Peace ought to be the ground work; and the work of Vattel deserves on this head the highest commendation.

Law of
Nations.

Besides this universal law of nations, it is also very very useful to become acquainted with the special law on this head of our own state.*

3. The study of the criminal law. — Al-

Criminal
Law.

* A work of this kind for England, might be found useful as well as interesting, if made from authentic and official documents, and without going into politics or controversy.—T.

**Criminal
Law.**

though this is treated on in the 47th and 48th book of the *Pandects*, its importance requires a particular study and notice.

For the studies at the academy, however, a manual like that of Meister's, or Boehmer's, is sufficient.

**Canon
Law.**

4. The study of the canon law.

It is quite absurd and irregular to style one's-self *doctor in both laws*, and at the same time be ignorant of the *canon law*. The time devoted to academical studies does not allow the student to go far in this study; but he ought, at least, to know the difference between the *municipal and canon law*.

**Modern
Law.**

5. The study of the modern law* cannot be better founded, than on the *Introduction* of Grotius, illustrated by the observations† of the *Society of Lawyers*, further explained in the *Theses* of Professor Van Der Keessel.

SECT. IX.

**Studies af-
ter taking
a Degree.**

Our young jurist, who has pursued diligently this course, is now in a state to take his degree of LL.D. He must then compose his treatise, or dissertation, on some text of the law, at his choice; such as to furnish a proof of his proficiency: since the obtaining his degree by

* i. e. Of Holland.—T.

† Published at Amsterdam, in 3 vols., 8vo.

some trifling thesis gives rise to a suspicion of ignorance, or the want of ambition.

Studies after taking a Degree

When he has obtained his degree, he has a double task to perform. First, to perfect the studies of which he has laid the foundation at the academy; next, to study with profit the more extensive and profound commentators: and in this it appears highly necessary that he should, from time to time, devote some hours to the re-perusal of the first principles, as if he were yet at the university.

The study of the Commentary on the *Pandects*, by Professor Voet, which particularly shews how far the Roman law is yet binding, and in force; and whose authority is, with reason, very great in our courts, cannot be too much recommended. Next, he has a fresh course to pursue, that of law* and practice conjointly.

With respect to the law, he will apply himself to the study of the printed opinions and decrees—he will study the cases which appear most remarkable upon the principles of law, as already acquired by him, and by this means exercise himself in the just application of the rules of law to cases, which properly forms the character of the true lawyer; and, in order to assist his memory, a common-place book may

* By “law,” here, the learned author seems to mean the law as brought up to the time by cases and decisions.—T.

Studies after taking a Degree.

be useful on this head ; or, what is perhaps much better, an interleaved copy of Voet, to note in their places the passages of other writers, and thus to have at hand the opinions of the best authors on each head, without loss of time.

He must also apply himself further to the study of those parts of the law, which, from their daily use, require a more ready and thorough knowledge, particularly, and with the greatest diligence, that of the criminal law, which is of such vast importance to the preservation and safety of the community ; and as this subject is now treated with a greater knowledge of mankind than it was by *Farinacius*, Julius Clarus, and Carpzovius, he must make himself familiar with the modern writers on this head. The works of Boehmer, Quistorp, and others, will easily open the road to him.

Again, as our country is a commercial one, and mercantile questions have, as it were, a special analogy, he must not neglect to acquire a competent knowledge of the Law Merchant, particularly of maritime law, or the law of assurance, and of bills of exchange.

However well prepared the student may now be in law and principle, still a laborious task remains for him, namely, to acquire the practice ; this is of two kinds, *theoretical* and *practical* (if I may use the term). For the theo-

retical part, the different writers on the *manner of proceeding*, and also my treatise on the subject as to the mode of proceeding before the courts, *Verhandeling over de Judiciële Practijk*, I may, perhaps, on the testimony of others (*laus enim propria sordet*), venture to recommend;* and, after a knowledge of these, the writings of Merula, Van Alphen, and others, may be read to advantage.

Studies after taking a Degree.

But the practical part after the theory is well understood, such as drawing the pleadings, remains. The study of those which are printed; particularly the written pleadings and arguments in great cases, so far as they can be procured, is valuable.†

The assiduous attendance at the Roll Courts (where the formal and preparatory pleadings are held); and lastly, a course with an experienced draughtsman or pleader, will complete the studies which should form the advocate, conformable to the idea of the immortal Grotius

* It is a duty the translator owes to the reputation of the learned author, to declare, that this work is of the highest authority, and most deservedly so in the Dutch ceded colonies.—T.

† In great cases, the court of Holland used to order a written argument, which generally contained all the law on the subject, and was frequently very elaborate. Many of these are printed in the different collections of the opinions of the most celebrated Dutch lawyers, and great names affixed to them.—T.

Studies af- of this office,¹ which he has so beautifully ex-
ter taking pressed in the following verses :
a Degree.

“ Qui sancta sumis arma civilis togæ,
Cui se reorum capita, fortunæ, decus,
Tutanda credunt, nomini præsta fidem,
Juris sacerdos, ipse dic causam tibi,
Litemque durus arbiter præjudica:
Voto clientum jura metiri time,
Nec quod colorem patitur, id justum puta.
Peccet necesse est sæpe, qui nunquam negat.”

¹ H. GROTIJ Epigramm., lib. i. inter ipsius Poëmata,
pag. 224.

CHAPTER II.

On the Formation of a Select Law Library.

SECT. I.

As a mechanic, artificer, or surgeon, cannot exercise their respective professions without the necessary instruments, neither can any one, without the proper books, become a lawyer. Yet it is sometimes a matter of doubt in this study which to select.

If we take up a hastily and ill-written book, merely got up for sale, it leads us into error.

Again, if we take those of an indifferent or middle character, they frequently oppress rather than assist the student, by the quantity of unnecessary matter. The best book is that which neither overwhelms the subject nor misleads the reader, by doubtful authority laid down positively, without either reference or qualification. This is particularly the case with a lawyer's library, wherein a good choice is of the highest importance.

To guide us in this, we may consult—

B. G. STRUVII, *Bibliotheca Juris selecta, cum emendationibus* C. G. BUDERI. *Jenæ*, 1756, in 8vo.

E. C. WESTPHAL'S *Systematische Anleitung zur kenntniz der besten Bücher in der Rechtsgelahrheit*. Leipz. 1791, in 8vo.

And if a universal catalogue of all the books which have ever been written on the science be desired, we must consult :

M. LIPENII, *Bibliotheca realis Juridica, cum Supplementis*. Lips. 1757-1789, 4 vols. in folio.

SECT. II.

Prepara-
tory Stu-
dies.

First, however, we must shortly mention those books which relate to the preparatory studies.

1st. In the Latin tongue.

Among the classic authors, we ought to give the preference to those who at the same time teach us something : as EUTROPIUS, for the Roman history ; JUSTIN, for universal history. For a clear and pure Latinity, NEPOS, and the Oration and Letters of CICERO, are to be recommended.

As a Dictionary for daily use—

J. J. G. SCHELLERI, *Lexicon Latino Belgicum Auctorum Classicorum, curante, D. RUHNKENIO*. L. B. 1799, 2 vols. in 4to.

And for those who do not regard the cost,

J. FACCIOLATI, *totius Latinitatis Lexicon*. Patav. 1771, 4 vols. in folio.¹

(1) The world is overloaded with so many useless books ; yet we may ask, why is not this incomparable treasure of learning rendered more attainable by a new edition ?

These dictionaries, however, are confined to the Latinity of the golden and silver ages ; but sometimes the knowledge of words of the iron age is necessary ; and for this end, we must add—

Prepara-
tory Stu-
dies.

J. M. GESNERI, *novus Linguae Latinae Thesaurus*. Lips. 1749, 4 vols. in fol.

For the acquiring a pure Latin style, we must read :

J. G. HEINECCII, *Fundamenta Stili cultioris*. Lips. 1766, in 8vo.

J. J. G. SCHELLERI, *Præcepta Stili bene Latini, imprimis Ciceroniani*. Lips. 1784, 2 vols. in 8vo.

2d. For the Latinity of the ancient Roman lawyers :

C. A. DUKER, *de Latinitate Veterum Jurisconsultorum*. L. B. 1711, in 8vo.

For this purpose, also, the following law dictionaries will be found useful.

J. CALVINI, *Lexicon Juridicum*. Coll. Al. 1734, in fol.

B. BRISSONIUS, *de Verborum Significatione*. Hal. Magd. 1743, in fol.

B. P. VICAT, *Vocabularium Juris utriusque*. Neap. 1760, 4 vols. in 8vo.

3d. For the Greek tongue, it may be sufficient to recommend the following :

J. D. A'LENNEP, *Etymologicum Linguae Græcæ*,

Prepara-
tory Stu-
dies.

cum animadversionibus E. SCHEIDII. *Traj.* 1790, 2 vols. in 8vo.

J. D. A'LENNEP, *Analogia Linguae Græcæ.* *Ibid.* 1790, in 8vo.

And as Dictionaries :

B. HEDERICI, *Græcum Lexicon Manuale*, curante J. A. ERNESTI. *Lips.* 1788, in 8vo.

J. SCAPULÆ, *Lexicon Græco-Latinum.* *Amst.* 1687, in fol.

4th. The Roman history :

EUTROPII, *Breviarium Historiæ Romanæ*, cum not. var. et H. VERHEYK. *L. B.* 1762, in 8vo.

EUTROPII, *idem cum not. var. et* C. H. TSCHUCKE. *Lips.* 1796.

G. H. NIEUPOORT, *Historia Reipublicæ et Imperii Romanorum.* *Traj.* 1723, 2 vols. in 8vo.

Y. VAN HAMELSVELD, *Romeinsche Geschiedenissen van M. STUART verkort*, in vier Deelen. *Amst.* 1805, in 8vo.

The great work of Stuart deserves certainly the highest praise, but it is too extensive for a young student.

5th. The Roman antiquities :

G. H. NIEUPOORT, *de Ritibus Romanorum.* *Traj.* 1774, in 8vo.

S. PITISCI, *Lexicon Antiquitatum Romanorum.* *Hag. Com.* 1737, 3 vols. in fol.

Especially those antiquities which serve to

illustrate the Roman law, and which are highly necessary to the lawyer.

Prepara-
tory Stu-
dies.

J. G. HEINECCII, *Antiquitates Romanæ*. Leov. 1778, in 8vo.

J. GUTHERIUS, *de Officiis Domus Augustæ*. Lips. 1662, in 8vo.

6th. The history of the Roman law :

J. V. GRAVINÆ, *Origines Juris Civilis; in ipsius Operibus*. Venet. 1739, in 4to.

J. G. HEINECCII *Historia Juris Civilis Romani ac Germanici*. L. B. 1740, in 8vo.

J. A. BACHII,¹ *Historia Jurisprudentiæ Romanæ, cum observ.* A. C. STOCKMANN. Lips. 1796, in 8vo.

J. BERTRANDUS, *de Jurisperitis*. L. B. 1675, in 8vo.

G. MASCOVIUS, *de Sectis Sabinianorum et Proculianorum*. Lips. 1728, in 8vo.

7th. A general knowledge of the Belles Lettres :

J. A. ERNESTI, *Initia Doctrinæ Solidioris*. Lips. 1783, in 8vo.

J. M. GESNERI, *Isagoge in Eruditionem universalem*. Lips. 1784, 2 vols. in 8vo.

Especially of Logic :

D. VAN DE WYNPERSE, *Institutiones Logicæ*. L. B. 1779, in 8vo.

¹ This is the best manual on this subject, and cannot be too much studied.

Prepara-
tory Stu-
dies.

J. WATTS, *Logica, of onderwoys van't recht gebruik der Reden.* 's Hage 1768, in 8vo.

J. WATTS, *Verhandeling over de oeffening en beschaving van't Verstand.* Ibid. 1766, in 8vo.

Of Mathematics :

EUCLIDIS, *Elementa*, edente J. H. VAN LOM. Amst. 1738, in 8vo.

P. STEENSTRA, *Grondbeginzels der Meetkunst.* Leyd. 1797, in 8vo.

J. H. VAN SWINDEN, *Grondbeginsels der Meetkunde.* Amst. 1790, in 8vo.

Of Ethics :

S. PUFENDORF, *de Officio hominis et civis.* L. B. 1769, 2 vols. in 8vo.

8th. A knowledge of the modern languages :
(a.) The French tongue.

Among the infinite number of grammars, we prefer :

RESTAUT, *Grammaire Française.* Paris 1786, in 12mo.

And among the Dictionaries :

P. MARIN, *Fransch en Nederduitsch Woordenboek.* Amst. 1793, 2 Deelen, in 4to.

Dictionnaire de l'Académie Française. Nismes 1787, 2 vol. in 4to.

And for the technical terms of almost all sciences, no work is equal to

Le Dictionnaire de Trevoux. Paris 1752, 7 vols. in fol.

(b.) For the German, or High Dutch, we recommend the grammars of: Prepara-
tory Stu-
dia.

J. C. GOTTSCHED, *de Hoogduitsche Spraakmeester*. Amst. 1786.

J. C. ADELUNGII, *Grammatica Theodisca*. Lips. 1798, in 8vo.

And for Dictionaries :

Nouveau Dictionnaire Allemand-François, et François-Allemand, à l'usage des deux nations. Strasb. 1800, 2 vols. in 4to.

J. G. HAAS, *neues Teutsches und Französisches Wörterbuch*. Leipz. 1786, 3 Theile, in 8vo.

But the most excellent, beyond all controversy, for those who wish a thorough and fundamental knowledge of the German language, is :

J. C. ADELUNG, *Grammatisch-Kritisches Wörterbuch der Hochdeutschen Mundart*. Leipz. 1798, 4 Theile, in 4to.

(c.) The Dutch language.

As the polishing of this language seems to be an object of much attention at present, the following books should be diligently read :

M. SIEGENBEEK, *Verhandeling over de Nederduitsche Spelling*. Amst. 1804, in 8vo.

P. WEILAND, *Nederduitsche Spraakkunst, ten dienste der Scholen*. Amst. 1806, in 8vo.

P. WEILAND, *Nederduitsch Taalkundig Woordenboek*, Amst. 1799.—*Deelen*, in 8vo.

Prepara-
tory
Studies.

To acquire a more profound knowledge of this language, we may add :*

L. TEN KATE, *Aanleiding tot de Nederduitsche Sprake*. Amst. 1723. 2 Deelen, in 4to.

B. HUYDECOPER, *Proeve van Taal, en Dichtkunde*, Leyd. 1782. 4 Deelen, in 8vo.

D. VAN HOOGSTRAATEN, *Zelfstandige Naamwoorden, vermeer derd door A. KLUIT*, Amst. 1783, in 8vo.

9. The history of Holland.

L. OFFERHAUS, *Compendium Historiæ Fæderati Belgii*. Gron. 1763, in 8vo.

Vaderlandsche Historie verkort, en vervolgd tot 1787. Amst. 1792. 2 Deelen, in 8vo.

J. WAGENAAR, *Vaderlandsche Historie*, 21 Deelen.—Met de Vervolgen.

Also a knowledge of its constitution, as it has existed from time to time, which is to be found in the following elegant work :

F. W. PESTEL, *Commentarii de Republicâ Batavâ*. L. B. 1795, 3 vols. in 8vo.

And for a knowledge of its actual state, the last constitution, and subsequent orders, resolutions, and decrees of the government, must be studied.

* This is a most profound inquiry into the origin of the Dutch language, and will be found highly useful to the philological student.—T.

SECT. III.

In order to give a regular list of the books which relate to the study of the law itself, we must begin with the Roman law. Roman Law.

1. First as it existed before the time of Justinian.

J. GOTHOFREDUS, *ad Legis XII. Tabularum fragmenta*. Genev. 1653, in 4to., et in OTTONIS *Thesauro*, Tom. 3.

C. RITTERSHUSIUS, *ad Legem XII. Tabularum*. Argent. 1616, in 4to.

BOUCHAUD, *Commentaire sur la Loi des Douze Tables*. Paris 1787, in 4to.

A. SCHULTINGII, *Jurisprudentia Ante-Justiniana*, L. B. 1717, in 4to.

J. GOTHOFREDI, *Coder Theodosianus*, edente RITTERO. Lips. 1736, 6 vols. in fol.

2. The best editions of the Corpus Juris.

Corpus Juris Civilis Glossatum. Ludg. 1612, 6 vols. in fol.

Corpus Juris Civilis, cum notis D. GOTHOFREDI et S. VAN LEEUWEN. Amst. 1663, in fol.

Corpus Juris Civilis, ex recensione G. C. GEBAUERI. Gött. 1778, 2 vols. in 4to.

Corpus Juris Civilis. Amst. 1664, 1681, vel 1700, in 8vo.

3. The Institutes.

Institutiones Justiniani, cum notis A. VINNII. L. B. 1753, in 8vo.

THEOPHILI, *Paraphrasis Institutionum, cum*

Roman
Law.

not. var., et G. O. REITZ. Hag. Com. 1751, 2 vols. in 4to.

Manuals, or Abridgments of these :

J. F. BÖCKELMANNI, *Compendium Institutionum. Amst. 1802, in 8vo.*

J. O. WESTENBERG, *Principia Juris secundum ordinem Institutionum. L. B. 1766, in 8vo.*

J. G. HEINECCII, *Elementa Institutionum. Amst. 1728, in 8vo.*

J. VAN MUYDEN, *Compendium Institutionum, cum notis E. OTTONIS. Traj. 1737, in 8vo.*

A. PEREZII, *Erotemata ad Institutiones. Amst. 1669, in 12mo.*

Commentaries on these :

J. G. HEINECCII, *Recitationes in Elementa Institutionum. Leov. 1773, in 8vo.*

J. BORCHOLTEN, *ad Institutiones. Genev. 1639, in 4to.*

C. RITTERSHUSIUS, *ad Institutiones. Argent. 1649, in 4to.*

E. OTTO, *ad Institutiones. Traj. 1729, in 4to.*

J. A. COSTA, *ad Instituta, curante J. VAN DE WATER. L. B. 1744, in 4to.*

A. VINNII, *Commentarius ad Instituta, ex editione J. G. HEINECCII. Lugd. 1767, in 4to.*

J. J. WISSENBACH, *Disputationes ad Instituta. Franeg. 1700, in 4to.*

4. The Pandects.

R. J. POTHIER, *Pandectæ Justinianæ, in novum ordinem digestæ. Lugd. 1782, 3 vols. in fol.*

Basilica FABROTTI, cum RUHNKENII *Supplemento*. Paris 1647, et L. B. 1766, 8 vols. in fol. Roman Law.

Abridgments of these :

C. VAN ECK, *Principia Juris Civilis, secundum ordinem Digestorum*. Traj. 1756, 2 vols. in 8vo.

J. O. WESTENBERG, *Principia Juris, secundum ordinem Pandectarum*. L. B. 1764, in 8vo.

J. G. HEINECCII, *Elementa Pandectarum*. Amst. 1728, in 8vo.

J. VOET, *Compendium Pandectarum*. L. B. 1731, in 8vo.

Commentaries on these :

A. SCHULTINGII, *Enarratio primæ partis Pandectarum*. L. B. 1720, in 8vo.

G. NOODT, *Commentarius ad Pandectas ; in ipsius Operibus*. L. B. 1767, in fol.

J. J. WISSENBACH, *Exercitationes ad Pandectas*. Franeq. 1661, in 4to.

J. BRUNNEMAN, *ad Pandectas*. Francof. 1692, in fol.

H. ZOEZII, *Commentarius ad Pandectas*. Lovan. 1692, in fol.

J. VOET, *Commentarius ad Pandectas*. Hag. Com. 1707, 2 vols. in fol., cum *Supplemento nostro, cujus Sect. I. prodiit Traj. 1793, et reliquæ D. V. sequentur*.

5. The Code of Justinian.

A. PEREZIUS, *ad Codicem*. Amst. 1671, in 4to.

J. BRUNNEMAN, *ad Codicem*. Lips. 1688, in fol.

Roman
Law.

J. J. WISSENBAUGH, *Commentarius in Codicem. Franeq.* 1665, 2 vols. in 4to.

6th. The Novellæ of Justinian.

J. F. HOMBERGK, *Novellæ Constitutiones Justiniani. Marb.* 1717, in 4to.

C. RITTERSHUSIUS, *ad Novellas. Argent.* 1615, in 4to.

C. F. ZEPERNICK, *delectus Scriptorum, Novellas Justiniani illustrantium. Hal.* 1783, in 8vo.

SECT. IV.

To lay a solid foundation for the study of the Roman law, it is necessary, besides the above general commentaries, to be able to consult the best writers on particular parts of this law, for the explanation or right understanding of special heads. To class and arrange each of these writers, would extend this introduction too much. I have therefore thought it better to give here an alphabetical list of the other books most necessary for the study of the Roman law, either as regards its entire system, or its special parts, since to those to whom the institutes have already become familiar, it will cost but little trouble to determine what use they should make of any of these.

In Folio.

B. BRISSENIUS, *de Formulis et solemnibus Populi Romani verbis, ex recensione J. A. BACCHII. Lips.* 1755.

C. VAN BYNKERSHOEK, *Opera omnia*. L. B. 1767. Roman Law.

F. CONNANI, *Commentarii Juris Civilis*. Neap. 1724.

J. CUJACII, *Opera omnia, ex editione C. A. FABROTI*. Neap. 1758, 11 vol.

J. DOMAT, *les Loix Civiles dans leur ordre naturel*. Paris 1745.

H. DONELLI, *Commentarii Juris Civilis*. Francof. 1626.

H. DONELLI, *Commentarii ad Codicem*. ib. 1599.

F. DUARENI, *Opera omnia*. Aurel. Allobr. 1608.

A. FABRI, *Rationalia in Pandectas*. Lugd. 1659, 6 tom. 4 vol.

A. FABRI, *Conjecturæ Juris Civilis*. Lugd. 1661, *et Jurisprudentiæ Papinianæ scientia*. Lugd. 1658.

J. GOTHOFREDI, *Opera Juridica minora, ex editione C. H. TROTZ*. L. B. 1733.

O. HILLIGERI, *Donnellus enucleatus*. Antw. 1642. *Jurisprudentia Romana et Attica, cum præfatione J. G. HEINECCII*. L. B. 1738, 3 vol.

G. MEERMAN, *novus Thesaurus Juris Civilis et Canonici, cum Supplemento*. Hag. Com. 1751, 8 vol.

E. OTTONIS, *Thesaurus Juris Romani*. Traj. 1733, 5 vol.

In Quarto.

G. D'ARNAUD, *variæ Conjecturæ*. Leov. 1744.

Roman
Law.

J. F. BÖCKELMAN, *Commentarii in Digesta et de Actionibus*. Traj. 1694, 2 vol.

J. H. BOEHMERI, *Exercitationes ad Pandectas*. Gött. 1764, 6 vol.

P. C. BREDERODII, *Repertorium Sententiarum*. Francof. 1664.⁽¹⁾

J. CANNEGIETER, *Fragmenta Ulpiani et Observationes*. L. B. 1774.

H. CANNEGIETER, *Commentarius ad Fragmenta veteris Jurisprudentiæ, quæ exstant in Coll. L. L. Mos. et Rom.* Franeq. 1765.

C. COCCEJI, *Exercitationes curiosæ*. Lemg. 1722, 2 vol.

J. à COSTA, *Prælectiones ad illustriores quosdam titulos locaque selecta Juris Civilis, edente B. VOORDA*. L. B. 1773.

D. FELLEMBERG, *Jurisprudentia antiqua*. Bern. 1760, 2 vol.

J. G. HEINECCII, *Commentarius ad Legem Julianam et Papiam Poppæam*. Amst. 1726.

U. HUBERI, *Prælectiones Juris Civilis, cum additionibus C. THOMASII*. Francof. 1749 3, vol.

U. HUBERI, *Digressiones Justinianæ*. Franeq. 1696.

(1) This book is particularly useful in enabling us to find with ease the several laws cited, and renders to an advocate almost the same service as the *Concordance of the Bible* does to a clergyman. It deserves the greater commendation, as the composer possessed a solid and accurate knowledge of the law.

U. HUBERI, *Eunomia Romana*. Amst. 1724. Roman Law.
M. LYCKLAMA à NYEHOLDT, *Membranæ*. Leov.

1644.

E. MERILLII, *Opuscula varia*. Neap. 1720.

J. MEIJERI, *Collegium Argentoratense*. Argent. 1657, 3 vol.—et G. BICCHII, *Collegium Argentoratense encucleatum*. Argent. 1664.

E. OTTONIS, *Dissertationes Juris Publici et Privati*. Traj. 1723.

A. SCHULTINGII, *Dissertationes*. L. B. 1714.

E. SPANHEMII, *Orbis Romanus*. Hal. 1728.

G. A. STRUVII, *Syntagma Jurisprudentiæ*. Francof. 1692, 2 vol.

P. TOULLIEU, *Collectanea*. Gron. 1737.

A. VINNII, *Tractatus quinque*. Traj. 1697.

C. F. WALCHII, *Opuscula*. Hal. Magd. 1785, 3 vol.

J. VAN DE WATER, *Observationes Juris Romani*. Traj. 1713.

In Octavo.

J. AVERANII, *Interpretationes Juris*. L. B. 1753, 3 vol.

E. BRONCKHORST, *de Regulis Juris*. L. B. 1624.

C. H. ECKHARD, *Hermeneutica Juris*. Lips. 1779.⁽¹⁾

(1) This book we must recommend to the young student as an invaluable manual of the Roman Law. The re-reading and studying of it he will find of the greatest utility.—(To this the Translator begs to add his testimony.)

Roman
Law.

C. F. GLUCK, *ausführliche Erläuterung der Pandecten. Erl. 1797—Theile.*

J. GOEDDÆUS, *de Verborum Significatione. Herb. 1614.*

C. F. HOMMELII, *Corpus Juris Civilis, cum not. var. Lips. 1768.*

C. F. HOMMELII, *Palingenesia Librorum Juris veterum. Lips. 1767, 3 vol.*

C. F. HOMMELII, *Litteratura Juris. Lips. 1779.*

S. H. VAN IDSINGA, *Varia Juris Civilis. Harl. 1737.*

A. LEYSERI, *Meditationes ad Pandectas. Hal. 1772, 12 vol.—Exstat etiam editio in 4to.⁽¹⁾*

Æ. MENAGII, *Amoenitates Juris Civilis. Traj. 1725.*

E. MERCERII, *Conciliator. Berol. 1722.*

E. OTTO, *de Tutela Viarum Publicarum. Traj. 1731.*

E. OTTO, *de Ædilibus Coloniarum et Municipiorum. Lips. 1732.*

E. OTTO, *Jurisprudentia Symbolica Traj. 1730.*

E. OTTO, *Papinianus, L. B. 1718.*

G. PAUW, *Observationes Juris Civilis. Hag. Com. 1743.*

J. L. E. PUTMAN, *Interpretationes et Observationes. Lips. 1763.*

(1) The inquisitive reader will find much curious matter in this work.—(T.)

J. L. E. PUTMAN, *Probabilia Juris Civilis*. Roman Law.
Lips. 1768.

J. L. E. PUTMAN, *Adversaria Juris universi*.
Lips. 1775, 3 vol.

J. L. E. PUTMAN, *Variorum Opusculorum Sylloge*. *Lips.* 1786.

J. C. RUCKER, *Dissertationes, Observationes, et Orationes*, L. B. 1749.

F. RYGERBOS, *Observationes Juris Romani*.
Amst. 1748.

A. SCHULTINGII, *Notæ ad Digesta seu Pandectas*, edente N. SMALLENBURG. L. B. 1804,
tom. 1.

A. SCHULTINGII, *Notæ in tit.D. de Verb. Sign. et de Reg. Jur.* edente N. SMALLENBURG. L. B. 1799.

C. SIGONIUS, *de antiquo Jure Populi Romani*.
Lips. 1715, 2 vol.

J. VOORDA, *Interpretationes et Emendationes Juris Romani*. *Traj.* 1735.

J. VOORDA, *Electa*. *Traj.* 1749.

H. G. VAN VRYHOF, *Observationes Juris Civilis*. *Amst.* 1747.

J. O. WESTENBERG, *de Causis Obligationum*.
Harder. 1704.

A. WIELING, *Jurisprudentia restituta*. *Amst.* 1727.

A. WIELING, *Lectiones Juris Civilis*. *Traj.* 1740.

In duodecimo.

C. O. à BOECKELEN, *Opuscula*. L. B. 1678.

Roman
Law.

A. DUCK, *de usu et auctoritate Juris Civilis*. Lips. 1676.

J. GOTHOFREDI, *Manuale Juris*. L. B. 1676.

H. GROTII, *Florum Sparsio*. Amst. 1643.

C. A. RUPERTUS, *ad Enchiridion Pomponii* Franeq. 1696.

J. J. WISSENBACH, *de Verborum Significatione*. Franeq. 1654.

J. J. WISSENBACH, *de Regulis Juris*. Franeq. 1656.

SECT. V.

Controver-
sial
points of
Law.

To the handling of disputed or controverted points of the Roman law, the commentaries in general above referred to may serve; but, besides these, there are several special treatises on this subject, of which we recommend the following:

C. VAN ECK, *Theses Juris controversi*. L. B. 1775, in 8vo.

A. SCHULTINGII, *Theses controversæ*. L. B. 1738, in 8vo.

H. TREUTLERI, *Selectæ Disputationes*. Marp. 1666, in 4to.

R. BACHOVII, *Notæ ad Treutlerum*. Heidelb. 1617, 8 vol. in 4to.

H. GIPHANII, *Antinomiæ Juris Civilis*. Francof. 1666 in 4to.

A. FACHINEI, *Controversiæ Juris*. Col. 1660, in 4to.

G. A. STRUVII, *Evolutiones Controversiarum*. Francof. 1684, in 4to.

Controversial
points of
Law.

A. VINNII, *Selectæ Quæstiones : inter ipsius. Tract. V. supra memoratos.*

E. BRONCHORST, *Centuriæ Sex. Franeq.* 1695, in 8vo.

S. COCCEJI, *Jus Civile controversum.* Francof. 1740, 2 vol. in 4to.

A. MERENDÆ, *Controversiæ Juris.* Bruzel. 1745, 5 vol. in folio.

C. F. WALCHII, *Introductio in Controversias Juris Civilis.* Jenæ, 1791, in 8vo.

R. ZOUCHEI, *Quæstiones Juris Civilis.* Lond. 1682, in 12mo.

SECT. VI.

With respect to the law of nature and of nations, it would be very easy to give an extensive list of writers, particularly if thereto we add that of the different European states ; but it seems sufficient to our purpose to point out the following :

Law of
Nature
and of
Nations.

H. GROTIUS, *de Jure Belli ac Pacis, cum notis J. F. GRONOVII, et J. BARBEIRACII.* Amst. 1720, in 8vo.

H. GROTIUS, *cum Commentario H. et S. DE COCCEJI.* Lausan. 1751, 5 vol. in 4to.

H. GROTIUS, *le Droit de la Guerre et de la Paix, par J. BARBEIRAC.* Leid. 1759, 2 vol. in 4to.

Law of
Nature
and of
Nations.

S. PUFENDORF, *de Jure Naturæ et Gentium*,
ex editione G. MASCOVII. Francof. 1759, 2 vol.
in 4to.

S. PUFENDORF, *le Droit de la Nature et des*
Gens, par J. BARBEIRAC. Amst. 1734, 2 vol.
in 4to.

J. SCHEFFERI, *Grotius enucleatus. Gron. 1771,*
in 8vo.

F. W. PESTEL, *Fundamenta Jurisprudentiæ natu-*
ralis. L. B. 1788 in 8vo.

J. G. HEINECCII, *Elementa Juris Naturæ et Gen-*
tium. Hal. 1758, in 8vo.

P. R. VITRIARII, *Institutiones Juris Naturæ et*
Gentium. L. B. 1749, in 8vo.

R. CUMBERLAND, *Loix de la Nature, par J.*
BARBEIRAC. Leid. 1757, in 4to.

C. WOLFFII, *Jus Naturæ. Francof. 1740,*
8 vol. in 4to.

C. WOLFFII, *Jus Gentium. Hal. Magd. 1749,*
in 4to.

C. WOLFFII, *Institution du Droit de la Nature*
et des Gens, par E. LUZAC. Leid. 1772, in 4to.

E. OTTONIS, *Notitia præcipuarum Europæ Re-*
rum publicarum. Traj. 1739, in 8vo.

DE VATTEL, *le Droit des Gens. Leid. 1758,*
in 4to.

MONTESQUIEU, *de l'Esprit des Loix. Genev.*
1753, 3 vols, in 8vo.

G. FILANGIERI, *la Science de la Législation.*
Paris an VII. 7 vol. in 8vo.

G. NOEST, *algemeen Staats-recht. Amst. 1758, in 4to.* Law of Nature, &c.

SECT. VII.

Scarcely any of the old writers on criminal law deserve our notice. They contain, for the most part, a mass of observations which rather serve to darken than illustrate the subject; and almost all of them betray the inferior civilization of the time in which they wrote. Since, now the subject of crimes and punishments is beginning to be treated with more philosophy and knowledge of mankind, it has taken quite a different form, and in such a view of this most important part of the law, it will be sufficient to give the following list :

A. MATTHÆUS, *de Criminibus. Amst. 1661, in 4to.*

B. CARPZOVII *Practica rerum Criminalium, cum observationibus J. S. F. BÖHMERI. Francof. 1758, 3 vol. in fol.*

D. CLASENIUS, *in Constitutiones Criminales Caroli V. Francof. 1693, in 4to.*

J. S. F. BOEHMERI, *Meditationes in Constitutionem Criminalem Carolinam. Hal. Magd. 1774, in 4to.*

J. S. F. BOEHMERI, *Elementa Jurisprudentiæ Criminalis. Hal. 1774, in 8vo.*

C. J. HEILS, *Judex et Defensor in processu in-*

Criminal
Law.

quisitionis, seu Tractatus Criminalis Theoretico-Practicus. Hildb. 1768, in 4to.

J. L. BANNIZA, *Delineatio Juris Criminalis. Oenip. 1773, 2 vols. in 8vo.*

D. H. KEMMERICH, *Synopsis Juris Criminalis Pisis. 1768, in 8vo.*

C. F. G. MEISTER, *Principia Juris Criminalis. Lips. 1781, in 8vo.*

J. L. E. PUTMAN, *Elementa Juris Criminalis. Lips. 1779, in 8vo.*

DE BECCARIA, *Traité des Délits et des Peines: Amst. 1766, in 8vo.*

E. C. WIELAND, *Geist der Peinlichen Gesetze Leipz. 1783, 2 Theile, in 8vo.*

J. C. E. VON QUISTORP, *Grundsätze des Deutschen Peinlichen Rechts. Rost. 1792, 2 Theile, in 8vo.*

N. GROLMAN, *Grundsätze des Criminalrechts Wissenschaft. Giess. 1798.*

N. GROLMAN, *Bibliothek für die Peinliche Rechts-wissenschaft und Gesetzkunde. Herb. 1798. Theile.*

SECTION VIII.

Canon
Law.

To apply one's self specially to acquire the knowledge of this law, would be a study of itself, and is not exactly necessary for a lawyer; but to be entirely ignorant of it, would be a great defect in his education. It is, therefore,

best to take a middle course, for which purpose the following books may serve : Canon Law.

Corpus Juris Canonici, ex editione J. H. BOEHMERI. Hal. Magd. 1747, in 4to.

J. F. GIBERT, *Corpus Juris Canonici, per regulas naturali ordine digestas. Lugd. 1737, 3 vol. in fol.*

J. à COSTA, *Commentarii in Decretales Gregorii IX. Paris 1676, in 4to.*

C. RITTERSHUSII, *Differentiæ Juris Civilis et Canonici. Argent. 1668, in 4to.*

J. F. BOCKELMAN, *de differentiis Juris Civilis, Canonici et Hodierni, cum notis E. OTTONIS. Traj. 1737, in 8vo.*

J. H. BOEHMERI *Jus Ecclesiasticum Protestantium. Hal. 1720, 5 vol. in 4to.*

J. H. BOEHMERI, *Institutiones Juris Canonici. Hal. 1760, in 8vo.*

G. VON MASTRICHT, *Historia Juris Ecclesiastici. Amst. 1686, in 8vo.*

SECT. IX.

It now remains to notice the modern law and practice. According to the view with which we have proceeded throughout this work, we understand thereby the *law of Holland and the practice of the courts.* Modern Law.

With respect to this law, besides the Commentary of Voet above mentioned, we may make use of the following works :

Latin.

Modern
Law.

S. VAN LEEUWEN, *Censura Forensis, ex editione G. DE HAAS. L. B. 1741, in fol.*

S. à GROENEWEGEN, *de Legibus abrogatis. Amst. 1669, in 4to.*

C. R. AB OOSTERGA, *Censura Belgica ad Pandectas. Traj. 1661, 2 vol. in 4to.*

C. R. AB OOSTERGA, *Censura Belgica ad Codicem. Traj. 1666, in 4to.*

C. R. AB OOSTERGA, *Censura Belgica ad Institutiones. Traj. 1648, in 8vo.*

P. VOET, *Commentarius ad Institutiones. Gorinch. 1668, 2 vol. in 4to.*

P. GUDELINUS, *de Jure novissimo. Arnh. 1661, in 4to.*

F. ZYPÆI, *Notitia Juris Belgici. Antw. 1640, in 4to.*

H. J. ARNTZENII. *Institutiones Juris Belgici Civilis. Gron. 1783, 3 vol. in 8vo.*

D. G. VAN DER KESSEL, *Thesis selectæ Juris Hollandici et Zeelandici. L. B. 1800, in 4to.*

Dutch.

Among these, in the first place, must be ranked the statutes or placats of the land.

So far as these refer to the time of the government of the Earls of Holland, we consult

F. VAN MIERIS, *Groot Charterboek der Graaven van Holland, Leid. 1753. 4 Deelen, in fol.*

And for the laws made during the government of the States General, Modern Law.

CAU en SCHELTUS, *Placaat-Boek van de Staaten Generaal, van Holland, en van Zeeland, 9 Deelen: als mede het Generaal Register, door J. VAN DER LINDEN. 's Hage 1648—1770, et Amst. 1797, in fol.*

The revolution of 1795, and the changes which followed, have given birth to various laws, which are to be found in

Verzameling van Publicatiën voor de Ingezetenen der Bataafsche Republiek. Leijd. 1795, 18 Deelen, in 8vo.

The subsequent statutes must be collected, from time to time, as they are published.

Besides the general law of the land, the local laws or ordinances of the different provinces and districts must be attended to, which are sufficiently known, without requiring a place here.

In the study of the modern law, or law of Holland, we must also use the following works :

H. DE GROOT, *Inleiding tot de Hollandsche Rechtsgeleerdheid. Amst. 1738, in 4to.*

H. DE GROOT, *met Aanteekeningen van W. SCHORER. Middelb. 1767, in 4to.*

Rechtsgeleerde Observatiën over de Inleiding van H. DE GROOT.'s Hage 1777, 4 Deelen, in 8vo.

Modern
Law

S. VAN LEEUWEN, *Roomsch-Hollandsch Regt. met Aanteekeningen van C. W. DECKER. Amst. 1780, 2 Deelen, in 4to.*

S. VAN LEEUWEN, *Practijk der Notarissen. Rott. 1742, 2 Deelen, in 8vo.*

U. HUBER, *Hedendaagsche Regtsgeleerdheid. Amst. 1726, in 4to.*

G. VAN WASSENAAR, *Practijk Judicieel en Notariaal. Utr. 1746, 2 Deelen, in 4to.*

E. VAN ZURCK, *Coder Batavus, met de vermeerderingen van P. VAN DER SCHELLING. Leid. 1764, in 4to.*

A. LYBRECHTS, *Redeneerend Vertoog en Practijk over 't Notaris-Ambt: met de Aanmerkingen. Amst. 1780, 4 Deelin, in 4to.*

J. SCHOOLHOUDER, *Oeffenschool der Notarissen. 's Hage 1750, in 8vo.*

SECT. X.

Writers on
particular
branches
of Juris-
prudence.

For further assistance in the study of the modern law, it is very necessary to consult the most approved works of those who have written on special parts of this law, as relating more particularly to our present customs. It is not possible to give a perfect list of these: every one has his own opinion on this subject, and I shall therefore content myself with the following, as most necessary.

Latin.

Writers on
particular
branches
of Juris-
prudence.

A. FABER, *de Erroribus Pragmaticorum*.
Lugd. 1658, 2 vol. in fol.

A. PECKII, *Opera Omnia*. *Antv.* 1666, in fol.

M. A. GALVANUS, *de Usufructu*. *Genev.* 1676,
in 4to.

P. MONTANUS, *de Jure Tutelarum*. *Hag. Com.*
1656, in 4to.

H. FELICIUS, *de Societate*. *Gorinch.* 1666, in
4to.

T. M. DE ESCOBAR, *de Ratiociniis Administra-
torum*. *Francof.* 1618, in 4to.

A. VAN WEZEL, *Opera Omnia*. *Amst.* 1701,
in 4to.

H. BROUWER, *de Jure Connubiorum*. *Delph.*
1714, in 4to.

C. RODENBURG, *de Jure Conjugum*. *Traj.*
1653, in 4to.

J. CHRISTENIUS, *de Jure Matrimonii*. *Har-
derw.* 1651, in 12mo.

A. MATTHÆUS, *de Auctionibus*. *Traj.* 1653,
in 4to.

A. MATTHÆUS, *de Probationibus*. *Gron.* 1739,
in 4to.

A. MATTHÆUS, *Paroemiæ*. *Traj.* 1667, in
8vo.

J. A SOMEREN, *de Jure Novercarum*. *Traj.*
1668, in 8vo.

J. A SOMEREN, *de Repræsentatione*. *Traj.*
1676, in 8vo.

Writers on
particular
branches
of Juris.
prudence.

P. VERRYIN, *de Emptione et Venditione*. Amst. 1676, in 8vo.

J. VOET, *de Rebus Mobilibus et Immobilibus*. Traj. 1666, in 8vo.

J. VOET, *de Familia Erciscunda*. Traj. 1674, in 8vo.

Further to become acquainted with the best German works on law, the following will by experience be found useful:—

J. E. J. MULLER, *Promptuarium Juris Novum*. Lips. 1792, 7 vol. in 4to.

Dutch.

P. BORT, *Werken*. Leid. 1731, in fol.

F. BORT, *nagelate Werken*. Utr. 1745, in fol.
Verhandelingen van 't Genoodschap pro excolendo Jure Patrio. Gron. 1773, 4 Deelen, in 8vo.

P. PECKIUS, *Verhandeling van het hand-opleggen, met de Aanteekeningen van S. VAN LEEUWEN*. Amst. 1693, in 4to.

J. COS, *Regtsgeleerde Verhandelingen*. 's Hage 1733, in 8vo.

H. VAN DER VORM, *Verhandeling van het Versterf-recht, vermeerderd door V. J. BLONDEEL*. Amst. 1774, in 8vo.

R. J. POTHIER, *Verhandeling van het Wisselrecht*. Leid. 1801, in 8vo.

R. J. POTHIER, *Verhandeling van het Recht omtrent Sociëteiten of Compagnieschappen*. Ibid. 1802, in 8vo.

· R. J. POTHIER, *Verhandeling van Legaten. Ibid.* 1803, in 8vo.

Writers on particular branches of Jurisprudence.

R. J. POTHIER, *Verhandeling van Contracten en andere Verbintenissen. Ibid.* 1804, 2 Deelen, in 8vo.⁽¹⁾

B. VOORDA, *de Crimineele Ordonnantien, met Aanmerkingen. Leid.* 1792, in 4to.

G. FELTMAN, *Aanmerkingen over den Artikel-brief. 's Hage* 1716, in 8vo.

We should further add here, the best writers on commerce, maritime law, and bills of exchange; but as these are named in our notes on the fourth book of this work, we refer the reader there.

SECT. XI.

The studying of the printed opinions of the most celebrated Dutch lawyers on cases submitted to them, and the decisions of the courts, is of the highest importance. With respect to the printed opinions, we may use the following collections :

Legal Opinions and Decisions.

Hollandsche Consultatiën, met het Amsterdamsch derde Deel, en Kort. Begrip. Rott. 1661, 8 Deelen, in 4to.

(1) These works of the incomparable Pothier I translated with great advantage to myself, and they were favourably received by the public. I intend also to present to my country a translation of his work on maritime law.

Legal Opinions and Decisions.

Vervolg op de Hollandsche Consultatiën. Amst. 1780, 2 Deelen, in 4to.

G. DE HAAS, *nieuwe Hollandsche Consultatiën. 's Hage 1741, in 8vo.*

J. VAN DEN BERG, *Nederlandsch Advis-boek. Campen 1781, 4 Deelen, in 4to.*

C. VAN DER KOP, *nieuw Nederlandsch Advis-boek. 's Hage 1769, 2 Deelen, in 4to.*

Utrechtsche Consultatiën, met het Kort Begrip. Utr. 1676, 4 Deelen, in 4to.

NASSAU LA LECQ, *Algemeen Register op de Consultatiën. Utr. 1778, 2 Deelen, in 4to.*

J. M. BARELS, *Crimineele Adviesen. Amst. 1778, in 4to.*

J. M. BARELS, *Adviesen over den Koophandel en Zeevaart. Amst. 1780, 2 Deelen, in 4to.*

With respect to the printed decisions and decrees, the following are useful :

A. FABRI, *Coder Sabaudicus. Lugd. 1649, in fol.*

P. CHRISTINÆI, *Decisiones. Antv. 1671, 6 tom. in fol.*

C. NEOSTADII, *Decisiones utriusque Hollandiæ Curiae. Hag. Com. 1667, in 4to.*

J. COREN, *Observationes et Consilia. Amst. 1661, in 4to.*

C. VAN BYNKERSHOEK, *Quæstiones Juris privati. L. B. 1744, in 4to.*

J. LOENIUS, *Decisiën en Observatiën, door T. BOEL. Rott. 1755, in 4to.*

Decisiën en Resolutiën van den Hove van Holland. 's Hage 1751, in 4to. Legal Opinions and Decisions.

J. VAN DER LINDEN'S *Collection of the most important Decisions of the Courts of Holland. Leid. 1803, 1st vol. in 8vo.*⁽¹⁾

J. A SANDE, *Decisiones Frisicæ. Amst. 1698, in 4to.*

Z. HUBERI, *Observationes rerum Judicatarum. Leov. 1723, 2 vol. in 4to.*

Z. HUBERI, *Casus enucleati. Franeg. 1712, in 4to.*

S. BEUCKER, *Decisiones Supremæ Frisiorum Curiae. Leov. 1782, in 4to.*

H. RADELANT, *Decisiones Curiae Trajectinæ. Traj. 1637, in 4to.*

P. STOCKMANS, *Decisiones Curiae Brabantiae. Brux. 1670, in 4to.*

G. DE WYNANTS, *Supremæ Curiae Brabantiae Decisiones. Bruxel. 1744, in fol.*

SECT. XII.

We now come to the conclusion of the Introduction, viz. to the *theoretical knowledge of the* Practice.

(1) I should long since have given a second volume of this work, had certain promises of furnishing me with the loan of the papers in some old causes been better fulfilled.

I again, therefore, invite this assistance; and the public may rely on my diligence to advance this work.

Practice. *practice*, which may be sufficiently acquired from the following books :*

J. VAN DER LINDEN, *Verhandeling over de Judicieele Practijk. Leid. 1794, 2 Deelen, in 8vo.*

P. MERULA, *Manier van Procedeeren, met de vermeederingen van D. LULIUS et J. VAN DER LINDEN. Leid. 1781, 2 Deelen, in 4to.*

W. DE GROOT, *Inleiding tot de Practijk. 's Hage 1667, in 4to.*—This is also in Latin, under the title of G. GROTII, *Isagoge ad Præin Fori Batavici, cum notis A. DE PAPE. L. B. 1694, in 4to.*

W. VAN ALPHEN, *Papegaij, of Formulier-Boek. Utr. 1740, 2 Deelen, in 4to.*

* To translate the titles of these books, would be useless to the English reader, as there are no translations of the books themselves. Those, therefore, who wish to practice as advocates in the Dutch ceded colonies, or to hold judicial appointments there, must see the indispensable necessity of acquiring a knowledge of this language, unless they are prepared to be stopped, *in limine*, on points of practice: but the translator must say, that the first book named, Van der Linden's Treatise on the Judicial Practice, is the most useful, as well as the most modern book on the subject, and of undisputed authority in the Dutch colonies. The same author's Kort Begrip, or Manual, will also be found very useful; and the Inleiding, or Introduction of W. de Groot to the Practice of the Courts, is a book, the study of which, although written in old Dutch, will amply recompense the labour of perusal; but the translator has never been so fortunate as to meet with the Latin edition.—T.

P. VROMANS, *de Foro competenti*, door H. VAN MIDDELLAND. *Leijd.* 1722, in 4to. Practice.

Manier van Procedeeren voor den Hove van Holland. 's Hage 1729, in 8vo.

S. VAN LEEUWEN, *Manier van Procedeeren in Civiele en Crimineele zaaken.* Amst. 1721, in 8vo.

To these, also, are to be added the instructions and regulations of the court of Holland; also the ordinances and manner of proceeding in different towns. We have but few works in the Latin tongue on practice which are useful, except the “*Observationes Practicæ*” of A. Gail, and perhaps a few others.

This, then, is the plan for a lawyer's library. It might certainly be extended by the addition of several valuable works; but my object was to give a select library, and the person who possesses this, and understands how to make a good use of it, will be sufficiently capable, of himself, without my instructions, to enlarge and improve it, as he may deem necessary.

INSTITUTES
OF THE
LAWS OF HOLLAND.

BOOK I.
OF CIVIL JURISPRUDENCE.

CHAPTER I.
On Law in General.

SECT. I.
Jurisprudence is that science which teaches **Jurisprudence.**
us what is just or unjust.⁽¹⁾

SECT. II.
Justice and *Injustice* are measured by the **Justice.**

(1) *Justi atque injusti scientia*, Sect. 1. Instit. L. 10. Sect. 2.
ff. de Just. et Jure.

Justice

agreement or disagreement of any act with the law.⁽¹⁾

SECT. III.

Division of
Law or
Justice.

That which is *just* and *right*, is commonly divided into the right or *Law of Nature*, which includes all those duties both perfect and imperfect, which natural reason teaches us must be studied, to the advancement of our own happiness and that of others.⁽²⁾

The right or *Law of Nations*, which contains those laws or duties which one nation is accustomed to observe towards another; for example, the right of war, concerning treaties, &c.⁽³⁾

And lastly, the *Municipal Law*, containing the laws which the sovereign legislative power of any state has ordained and published.⁽⁴⁾

(1) L. 1. Sect 1. ff. de Just. et Jur. Grotius's Introduction to the Law of Holland, (De Groot Inleid) Book 1. Cap. 1. Sect 3. et seqq.

(2) Besides the works of Grotius, Puffendorf, and others, we must strongly recommend the work of Professor Pestel, in fundam Jurisprud. natur. An entirely new, revised, and improved edition of this Work is now in the press, which it is to be hoped the venerable and learned author may live to complete.

(3) Those who wish to study carefully the nature of the different forms of government, and the duties of nations to themselves and each other, may consult besides Grotius, Puffendorf, and other writers on International Law, Le Droit des Gens, par Vattel, in 4to.

(4) Sect. 1. Inst. de J. N. G. and C. That the Laws ought to be brought by promulgation to the knowledge of the people,

Since it is not the object of this work either to go into the extensive subject of all these duties, or a course of International Law, we shall confine ourselves, simply, to the third sort: *The Municipal Law*.

Division of
Law or
Justice.

SECT. IV.

When we are to answer the question, concerning what is the law in the case? we must first inquire, whether there is any general law of the land, respecting it, or any local ordinance or regulation, which has the force of law, or any established custom.⁽¹⁾ On failure of these, the *Roman Law*, as a model of wisdom and justice,⁽²⁾ is called in to supply the *casus omissus*.⁽³⁾

What
Laws are
to be ob-
served in
Holland.

The States of Holland in their resolution of the 25th of May, 1735, express themselves very clearly on this head, in the following words :

“ That the Court (i. e. of Holland,) like all

in order to have a binding force, is too clear to admit of doubt. Voet ad tit. ff. de legib. No. 9 and 10. How far, however, a resolution of the States which has not been published ought to have the force of law we have considered in our notes on Merula's Man. van Proced. B. 1. Tit. 4. Cap. 5. Sect. 1. Vol. 1. p. 69.

(1) V. D. Keessel. Thes. Jur. Holl. et Zeel. Th. 7.

(2) De Groot. Inleid. B. 1. D. 2. Sect. 22. No. 26.

(3) Concerning the time and the way in which the law was admitted into Holland, See H. Fagel and J. C. Van Der Hoop, Dissert. de usu Juris Romani in Hollandia (Hag. 1779) and J. P. Van de Spiegel, Oorspr. de Vaderl. Regten, Cap. 2 and 3.

What
Laws are
to be ob-
served in
Holland.

other tribunals in the Provinces of Holland and West Friesland, must do justice according to the laws and ordinances of the land, and also according to the privileges and old established customs and usages, and in failure of these, according to the *Written Law*.^{(1)*}

The use of the laws of neighbouring states, in a *casus omissus*, is another means which, although not to be entirely rejected, must however be resorted to with the greatest caution: and never but in those cases in which we are perfectly satisfied that the analogy of the law of the neighbouring state agrees in this point with our own.⁽²⁾

In some cases, also, the *Canon Law* is of use, namely, when the case in question takes its origin from this law, as the separation *a mensâ et thoro*, and the like.⁽³⁾

SECT. V.

Binding
force of
Statutes.

Among the laws which are first to be considered, are *Local Ordinances and Customs*. It

(1) See the Groot Placaat, or Statute Book, D. 7. p. 964.

(2) V. D. Keessel, Thes. Jur. Holl. et Zeel. Th. 13.

(3) V. D. Spiegel, Oorspr. der Vaderl. Regten, pag. 110 et seqq. V. D. Keessel, Thes. 25.

* By the Written Law, or *Jus scriptum*, is always understood on the Continent, the Roman Law, and it is very necessary to bear this in mind throughout the work.—T.

is beyond dispute that these bind all those that live at the place, or reside there for a time, or possess immoveable property there.

Binding
forces of
Statutes.

But have these, it may be asked, a binding force on legislators and judges in other places?

This is a very difficult point of law, and it may here be sufficient to observe, that although, according to the strictness of law, properly speaking, no statutes are in force out of the jurisdiction, yet the mutual and reciprocal comity of neighbouring states has established it as an almost universal rule, that with respect to the acts or contracts of persons who have observed the forms required by the law of their own domicile, these are determined on according to those laws, although the special law of the place where these contracts or deeds are to be interpreted or acted upon, may require other forms. For example—a will made according to the law of the place of the domicile of the testator, is valid every where; the community of goods introduced between married parties, according to the law of Holland remains in force, though they may hereafter change their domicile to a place where this community does not exist.⁽¹⁾

(1) With respect to the force of statutes, especially in the conflict of them, see P. Voet, Tract. de Statut. J. Voet, ad tit.

SECT. VI.

Interpre-
tation of
Law.

The interpretation of laws is of three kinds ;
1st. That which is given by the legislator himself.*

2d. That which is given by use—for example, by an uniform series of decisions by which this or that explication is given to a law.

3d. By the conception or opinion of lawyers ; for though the opinion of the latter have of themselves no authority in law, yet their explanations may sometimes be applied with advantage to the case, provided the rules of sound interpretation have not been overlooked, of which the principal are as follows :

1st. The first and chief rule in all interpretations is *this* ; to follow the true sense and

ff. de const. Princ. part 2. de Statut. V. D. Keessel. Thes. 27—44.

(See also Treatise of the Translator on this subject prefixed to the case of Odwin and Forbes, published by S. Sweet, 3, Chancery Lane, 8vo. 1823.)

* This, in English Acts of Parliament, is generally to be sought for in the Preamble, which by declaring the object of the Legislator in passing the Act in question, is a great guide to his true meaning and intention in obscure clauses.

The History also of the particular period at which the Act was passed, may be useful, as tending to shew more clearly what gave occasion to it ; as, for example, that of the Riot Act, 1. Geo. 1. C. 5.—T.

signification of the words, and not to depart from it when the words are clear.⁽¹⁾

Interpre-
tation of
Laws.

2d. In the interpretation of any point of law, we must, before all things, attend to *the source from whence this law is derived*; for example, in questions on wills, recourse should be had to the Roman law, which is followed on this head; but to follow the same track in a question on the community of goods, which is entirely unknown to the Roman law, and is of *Dutch* origin, would be quite absurd.⁽²⁾

3d. When the words of the law are doubtful, we must follow the *object* or *intention* of the law.

All the separate clauses of the law must be compared⁽³⁾ with each other, and one clause explained by the other.⁽⁴⁾ The declaration of the legislator in a similar case,⁽⁵⁾ or custom and usage,⁽⁶⁾ or that opinion or meaning which is

(1) See J. H. Boehmer de Interpretationis Grammaticæ fati et usu vario in Jure Romano, in Exerc. ad ff. Tom. 1, Exerc. 3, pag. 22, seqq.: and, above all, the excellent work of C. H. Eckhard, Hermeneutica Juris. cum not. C. F. Walchii. (Lips. 1779).

(2) V. D. Keessel. Thess. 9 and 10.

(3) L. 24. ff. de legib.

(4) L. 26. L. 27. L. 28. ff. de legib.

(5) L. ult. C. de legib.

(6) L. 37. L. 38. ff. de legib.

Interpre-
tation of
Laws.

most favourable to equity,⁽¹⁾ may be found useful.

Also the consideration of the consequences which would flow from the one or other interpretation, is very frequently of great use.⁽²⁾

4th. We may sometimes also extend the application of a law to similar cases, on the ground of a perfect similarity of principle, which is termed the *extensive interpretation* of the law.⁽³⁾

5th. In other cases, again, the interpretation must be *restrictive*, especially when any thing is contained in the law, contrary to the general rules of law, because of some special necessity in a particular case ;⁽⁴⁾ or when it clearly appears that the motives which have induced the legislator to depart from the general rules, do not extend to the particular case in question, though it otherwise might seem to come within the words of the law.⁽⁵⁾

(1) L. 18. L. 19. ff. de legib. L. 56. L. 168. L. 192. Sect. 1. ff. de Reg. Jur. L. 47. ff. de obl. et act.

(2) L. 22. ff. de legib.

(3) L. 10. L. 11. L. 12. L. 13. L. 29. L. 30. ff. de legib. L. 5. C. eod.

(4) L. 14. L. 16. L. 39. ff. de legib. L. 141. L. 162. ff. de Reg. Jur.

(5) L. 25. ff. de legib. L. 6. C. eod. See also, on this head, Pothier, in Pand. Justin. ad tit. ff. de legib. Art. 4.

SECT. VII.

Besides the written, or statute law, there are also *unwritten laws*. These we noticed before (Sect. iv.), under the name of *good and lawful customs*; such have always prevailed of old times in this land, and had the force of law.⁽¹⁾

Custom
and Usage.

Notwithstanding which there are some rules concerning these to be observed.

1st. The custom must be founded on good reason, otherwise it is justly regarded as a corruption, which, so far from possessing the force of law, must be rejected.⁽²⁾

2d. It must be properly proved, *i. e.* by a crowd or number of witnesses; by an unbroken series of decisions on the custom in question, &c.⁽³⁾

A custom clothed with these requisites, is not only of force in cases wherein the written

(1) V. D. Spiegel, Oorspr. der Vaderl. Regten. Cap. 3. Sect. 8. pag. 13. 96 et seqq. Observ. over De Groot's Inleid. 2 D. Obs. 1. Neither is it necessary to the authority of these old customs of the land, provided they are confirmed by long usage; whether they are registered in the court under the authority of the letters of the Emperor Charles V., in the years 1531, 1540, or of that of the Court in 1569, or not. See V. D. Wall, Handvest van Dordrecht. 6 Stuk. pag. 1328, et seqq. et Supplem. nostrum ad Voet, part 1, pag. 13.

(2) L. 39. ff. de legib. Voet ad d. t. n. 28.

(3) Voet ad tit. ff. de legib. n. 29. seqq.

or statute law fails,⁽¹⁾ but has even this force, that it can repeal a written law.⁽²⁾

SECT. VIII.

Repeal of
Laws.

The usual way, however, by which a law ceases to be of force, is its express repeal by the legislature;⁽³⁾ but the less frequently this happens, the more perfect is the state of legislation in any country.

And it is certainly to be reckoned among the evils of our time, that of latter years the laws are so multiplied, as almost to overpower the memory; and are not only some of them contradictory to each other, but even tend to give to our jurisprudence a too arbitrary character. However, we indulge, more and more, the hope, that in this respect we shall shortly return to our ancient certainty and simplicity.

(1) Sect. 9. Inst. de J. N. G. et C. L. 32. Sect. 1. L. 33. L. 35. ff. de legib.

(2) L. 32. Sect. 1. in fine. ff. de legib. Concerning the sense of the L. 2. C. quæ sit long. consuet, which is much disputed, see Noodt in Comm. ad. t. ff. de legib.; and, above all, J. Aycranus, Interp. Jur. L. 2. Cap. 1.

(3) L. ult. ff. de const. Princ. Sect. 11. Inst. de J. N. G. et C.

CHAPTER II.

Of the Rights of Men, according to their respective States in Society.

SECT. I.

As the objects to which all laws can be made to refer consist in these three things—1st. *Persons*, 2d. *Things*, and 3d. *Rights of Action*, (actien),⁽¹⁾ we shall take this division as the basis of this work.

Objects of
the Law.

And, therefore, 1st. treat of the rights which each man or person possesses, according to his relative state in society.

2d. Of the right *in* or *to* any thing; and in the inquiry into each of these rights, we shall take occasion, as it occurs, to notice the several kinds of *actions* or *means* which the law affords on these heads to maintain or defend them.

The form of commencing and pursuing these actions, will form the subject of the third Book.

SECT. II.

The different states of men or persons, so far as concerns their respective rights in society, may be classed under three heads:—

Different
States of
Persons.

(1) Sect. ult. Inst. de J. N. G. et C.

Different
States of
Persons.

- 1st. The state of freedom and slavery.
- 2d. The state of citizenship.
- 3d. Family relations.

SECT. III.

Freedom
and
Slavery.

The difference between *freemen* and *slaves*, which occupies so large a part of the Roman law, does not exist in our country, where all men are born free. Slavery is not in use in this country; nay, even the slaves who come here from the Indies become free (*ipso facto*) by their landing,⁽¹⁾ provided they are not *run-aways*, or fugitives.⁽²⁾

SECT. IV.

State of
Citizen-
ship.

With respect to the state of *citizenship*, its influence on the different rights of men was formerly very great in this country. *Aliens* were excluded from a great number of the rights of natural born subjects, and particularly with respect to the rights of *inheritance*, of giving *evidence* in a court of justice; also, in

(1) *Cost. v. Antwerpen*, Cap. 36. Art. 1. et 2. *Roseboom*, *Cost. v. Amsterdam*, Cap. 39. Art. 1. et 2. *Gudelinus*, de *Jure noviss.* Lib. 1. Cap. 4. pag. 6.

(2) *Regtsgel. Observ. over De Groot.* 4 D. Obs. 16.

(See also *Translator's Treatise on the Roman Law of Manumission*, page 154, and observations therein on Mr. Hargrave's argument on the case of *Somerset the negro*.)

respect to the punishment of crimes and misdemeanors, and the admission to offices.⁽¹⁾

State of
Citizen-
ship.

The goods of aliens were also subject to a heavy duty on being permitted to pass to their foreign heirs under the name *Recht van Erue*.⁽²⁾

The difference also between *nobles* and *plebeians* was very great, as is to be seen in the admission to offices and dignities; in the punishment of crimes, in the payment of taxes (*Schot and Lot*,) and in the privileges of the chase.⁽³⁾

Even *the service of God itself* could not but effect a remarkable difference in the state of men.

Besides also the ancient distinction between ecclesiastics and lay persons,⁽⁴⁾ *sectarians* were excluded from many of the privileges of citizens. None other than those who professed the reformed religion were admissible to offices or dignities.⁽⁵⁾

Marriages between persons of the reformed

(1) De Groot, Inleid, B. 1. 13 D. Sect. 2. Regtsgeel. Observ. 2 D. Obs. 17. and 18. and 3 D. Obs. 21.

(2) H. J. Arntzenius, Inst. Jur. Belg. Cu. part 1. tit. 12. S. 8 Seqq.

(3) A. Matthæus, de Nobilitate. De Groot, Inleid, B. 1. 14 D. and S. Van Lieuwen on Nobility in Holland. Van de Edelen en Welborenen in Holland.

(4) De Groot, Inleid, B. 1. 14 Deel.

(5) Zurck. Cod. Bat. Voce Papister, Sect. 21.

State of
Citizen-
ship.

religion and papists were subject to grievous penalties.⁽¹⁾

With the Jews it was still worse, since they were not admitted to exercise those trades or professions which belonged to certain guilds or companies.⁽²⁾

But by degrees, and in proportion as the relations of this country with foreign states became more extended, and as the age became more polished and enlightened, these distinctions have been done away: aliens who established themselves in Holland were admitted to almost all the rights of the other inhabitants.⁽³⁾

The duty on property left to foreigners just mentioned (*Het recht van exue*) was first lightened by several special treaties, and at length entirely repealed.⁽⁴⁾

The rights or privileges of the nobles, which were principally a remnant of the middle ages, are scarcely more respected,⁽⁵⁾ and the intemperate zeal of the different Christian sects no longer find supporters.

(1) Placaat Van de Staten Van Holland Van 24 Jan. 1755, repealed by Decree of 6th March, 1795.

(2) Zurck. Cod. Bat. Voce Joden.

(3) De Groot, Inleid. B. 1. 13 D. Sect. 3.

(4) Arntzenius loc. supra cit. Publ. 6 Apr. 1797.

(5) De Groot, Inleid, B. 1. 14 D. Sect. 6.

And the Jews, who bear the same burthens with us, enjoy also the same civil rights and privileges.⁽¹⁾ State of
Citizen-
ship-

But, notwithstanding all this, and that, abstractedly speaking, the opinions of the natural *equality of men* is, in itself, very beautiful and true,⁽²⁾ yet this idea has been pushed so far by many persons, and such pernicious conclusions drawn from it, that, in their zeal to remove entirely all civil distinctions, they have even shaken the very foundation of civil order and policy. However, from this perverse and extravagant application of the principle of equality, we are already, in a great degree, recovered; so that, at present, the state of citizenship, according to the several regulations of different towns and places, secures the enjoyment of particular privileges, from which all who are not citizens of such places are excluded; and, in particular, a check has been put to the unlimited abolition of all guilds or companies which had been the cause of many disorders, and which had nearly occasioned the destruction of all kinds of trade and handicrafts; and the re-establishing necessary limits and

(1) Staatsregeling (Resolution of the States), Oct. 1801. Art. 11-14.

(2) See the Treatises of H. C. Cras, and L. W. Brown, on the Equality of Men, and their Rights and Duties, in the Treatise of Teyler's Godgel. Genoodschap. 13 Decl.

State of
Citizen-
ship.

restrictions in the exercise of different crafts and trades, so as to secure to each citizen who is a member thereof, an honest subsistence,⁽¹⁾ is a further proof of our return to a sounder way of thinking.

SECT. V.

III.
Family
Relations.

The relations of family, however, are those which, in our country, create the greatest difference of rights among men, since the rights of married persons differ from those of *unmarried persons*. The very great effect of this difference renders it necessary to dedicate the third chapter of this work especially to the *rights of marriage*.

Again, the rights of parents are different from those of children subject to the *Parental Power*. — We shall, therefore, in the fourth chapter, treat of this power.

Again, the rights are different of those persons, who, from their youth, or the weakness of their faculties, or their prodigality and the like, are unfit to govern themselves or their property, consequently the rights are different of those to whom the care of such persons and their property is committed. — In the fifth chapter, therefore, we shall treat of the office of *Guardians and Curators*.

(1) Resolutions of the States, Oct. 1801. Art. 4.

CHAPTER III.

SECT. I.

Of Marriage, and the Rights thereto belonging.

VERY different is the state of those who are Marriage.
bound in marriage or not.—By marriage, we understand, the union of man and woman for the purpose of having and rearing children, and who are to continue united as one person for the rest of their lives through good and bad fortune.⁽¹⁾

SECT. II.

Marriage is frequently preceded by a contract, Trouw }
Beloften.
(*trouw beloften*) consisting in the obligation of the parties to contract a lawful marriage with each other.

The persons who enter into this contract must be capable of being united in marriage,⁽²⁾

(1) Sect. 1. Inst. de patr. potest. L. 1, ff. de rit. Nupt. Pestel, Fund, Jurispr. Natur. Sect. 127.—When we consider, weigh, and examine, even without the least superstition, the nature, the object, and the consequences of marriage, we cannot help wondering how any persons could fall into the error of classing it among *civil contracts*.

(2) Voet, ad tit. ff. de Sponsal, n. 2.

Trouw
Beloften.

and when the man is not twenty-five years of age, or the woman twenty, the consent of parents, guardians, or relations, is necessary, without which the marriage is clandestine and bad in law.⁽¹⁾

These contracts of marriage may be entered into *purely*, *i. e.* without any condition, or under condition, provided the condition be not *contra bonos mores*, or impossible, and also on the condition of taking place immediately, or after a certain time.⁽²⁾

The proof of consent to the contract of marriage must be perfectly clear, and on failure of proof, even the tender of oath could not be admissible in this case.⁽³⁾

The contract of marriage (*Trouw beloften*) gives an action for the perfecting of the marriage, by which the party, who is unwilling, may be constrained to the performance by civil confinement (*Gyzeling*).⁽⁴⁾

This contract, like all other contracts, may be rescinded by the mutual consent of the parties,⁽⁵⁾ but it cannot be annulled by one of the

(1) Plac. Van Keizer Karel (of the Emperor Charles V.) Oct. 4, 1540. Art. 17. Polit. Ord. 1580. Art. 3.

(2) Voet, ad tit. ff. de Sponsal, No. 6-10.

(3) De Groet, Inleid. B. 1, 5. D. Sect. 16. n. 23. Voet, ad tit. ff. de Sponsal, n. 11. Lybregts, Red. Vert. over't Not, ambt, 1 D. 6. Hoofdst, n. 10-16.

(4) Voet, ad tit. ff. de Sponsal, n. 12.

(5) Voet, ad tit. ff. de Sponsal, n. 18.

parties in opposition to the other, not even on the ground that the marriage would be displeasing to his or her parents, and that they would rather be obedient to them.⁽¹⁾ Trouw
Beloften.

When, however, there are lawful grounds of *repudiation*, the contract may be dissolved by one of the parties; as, for example, a sudden and continued lunacy of one of the parties, scandalous conduct of the woman with another man, and *vice versa*,—excessive dissipation, the incapacity to have children, a manifest deceit in the contract by the concealment of considerable debts, and the like.⁽²⁾ But these grounds, which too frequently have their foundation in the fickleness or caprice of the party complaining,⁽³⁾ must not be too easily admitted.

(1) Boel ad Loenii Decis. Cass. 55. However, upon the ground of the L. 20. C. de nupt. it is understood that a young woman above twenty, but under twenty-five, having entered into a contract of marriage without the consent of her parents, may be freed from it even without relief.—V. D. Keessel, Thes. 55. (Relief is that act of the Sovereign by which he frees parties from any contract or its consequences under equitable circumstances, and which power is committed by the Sovereign to the courts of equity in this country.—T.)

(See also the case of Odwin v. Forbes, p. 57.—T.)

(2) H. J. Arntzenii Instit. Jur. Belg. Cu. Part 2, Tit. 1, Sect. 39-45.

(3) Voet, ad tit. ff. de Sponsal, n. 15.

SECT. III.

Marriage
Contracts.

Frequently, also, the parties do not think proper to intermarry according to the law of the land, but on terms and conditions which are regulated by a special contract, which is termed an *Ante-Nuptial Contract*.⁽¹⁾

- To the validity of this, it is necessary that it be *in writing*, and contained in a *public instrument* (as by a notary),⁽²⁾ though it is not necessary to be *registered judicially*, since the Placaat on this head, of the 30th July, 1624, has never been acted upon.⁽³⁾

In these marriage contracts is sometimes inserted an inventory or list of the wife's property, sometimes it is contained in a separate and private instrument (i. e. not notarial) and annexed to the contract.⁽⁴⁾

The neglect to make and annex such an inventory does not vitiate the contract itself, but the proof of the wife's property must be made *aliunde*.⁽⁵⁾

(1) That is to exclude the community of goods and the like, which would otherwise take place by marriage, according to the law of Holland, without an ante-nuptial contract.—See also V. D. Keessel, Thes. 228.

(2) Regtsgel, Observ. 2 D. Obs. 35.

(3) Regtsgel, Observ. 1 D. Obs. 42. Handv. Van Amsterdam, 2 D. bl. 551.

(4) Ord. Van't Zegel Van 11 Sept. 1794 Art. 49.

(5) V. D. Keessel, Thes. 230.

SECT. IV.

By marriage contracts all such conditions may be stipulated as the parties think proper, provided they are not contrary to the nature of marriage.⁽¹⁾ What Conditions they may contain.

The most usual conditions are, 1. That the parties shall, on each side, bring in their separate property to the support of the marriage, without, however, thereby inducing any community of goods.⁽²⁾

2. That the one shall not be answerable for the debts of the other contracted before or after the marriage.

3. That the gain or loss shall either be mutual, or that the community in this shall be excluded, or that the wife or her heirs shall have the choice, on the dissolution of the marriage, to share or not in the profit and loss.⁽³⁾

4. That the wife, for her property, on the dissolution of marriage, shall have the right of dower, legal mortgage, or preference.⁽⁴⁾

(1) Voet, ad tit. ff. de pact. dot. n. 14 Seqq.

(2) H. J. Arntzenii, Inst. Jur. Belg. Civ. part 2. Tit. 5. Sect. 43 and 44.

(3) V. D. Keessel, Thes. Jur. Holl. et Zeel. Th. 249, et Seqq.

(4) And even if this privilege is not expressly stipulated, yet it ought to be given to the wife whenever she has guarded her property from the *communio bonorum*.—V. D. Keessel, Th. 247.

What conditions they may contain.

5. That the wife shall have the administration of her own property without its being subject in any way to the marital power.⁽¹⁾

6. That the survivor shall be entitled to a certain sum by way of gift, out of the goods of the party who dies first.

These gifts are termed *Douarie*, but as they have their origin merely in the liberality of the donor, it follows that they cannot be claimed, or received until after the payment of all the debts,⁽²⁾ and also according to the best opinions not till after the legitimate portion of the children has been satisfied.⁽³⁾

7. Such contracts may also provide how, after the death of one or both of the parties, the succession to the property is to be regulated.⁽⁴⁾

8. And how the goods of the children, in case they die within the age to make a will, shall be disposed of.⁽⁵⁾

(1) De Groot, Inleid, B. 1. D. 5. S. 24. n. 39.

(2) Placaat of Charles 5th. Oct. 4. 1580. Art. 6.

(3) In this the President Van Bynkershoek differs from us. *Quæst. Jur. Priv. Lib. 2. Cap. 7.*—But the refutation of the reasons adduced by him may be seen in the *Rechtsgel Observ. over De Groot, D. 3. Obs. 38.* and in the *Supplem. to D. 4. p. 259.*

(4) V. D. Keessel. *Thes. Jur. Holl. et Zeel. Th. 235. and 246.*

(5) This condition is known under the name of Choice of the

SECT. V.

Whatever the parties, by an ante-nuptial contract, have stipulated in each others' favour, cannot by any act during their lives, even with mutual consent, be afterwards revoked.⁽¹⁾ How far irrevocable.

Because this would have the effect of a gift between a man and his wife, which is not permitted in law.⁽²⁾

But such revocation is good when made by the last will, provided they both continue in this mind, and confirm it by death.⁽³⁾ Whether further the conditions in the marriage contract concerning the succession to the property are in like manner irrevocable, so that one of the parties shall not be at liberty to make any alteration therein, without the consent of the other, is a point on which lawyers differ. For our part we are most inclined to the opinion that such condition has merely the force of a last will, and may, therefore be revoked, by both or even one of the parties.⁽⁴⁾

Law of the Land, (respecting Inheritances) as there were different laws in this respect in the different States.

De Groot, Inleid, B. 2. D. 29. Lybregts, Reden. Vert. D. 2. Bijl. Litt. S. J. Coss, Rechtsgel. Verhand, 5.

(1) V. D. Keessel, Th. 264.

(2) De Groot, Inleid, B. 3. D. 2. S. 9. Voet, ad tit. ff. de Donis, inter. Vir. et ux. n. 17. seqq.

(3) Voet, ad tit. ff. de Pact. dotal. n. 62.

(4) Although different lawyers maintain the doctrine of irre-

SECT. VI.

Requisites
of Mar-
riage.

I.
Prohibited
Marriages.

The requisites to a lawful marriage may be stated as follow :

1st. That the parties who are about to enter into the state of wedlock, are capable to enter into this state generally, or with each other.

As to the general disability, those persons are incapable who are already in the marriage state, since polygamy is not permitted in Holland.⁽¹⁾ Those who have not yet attained the age of puberty, which in males is fourteen, and in females twelve years.⁽²⁾

A widow whose husband has not been dead a sufficient time to determine to a certainty whether she is pregnant or not;⁽³⁾ those who are of such mental incapacity as to render their consent to this contract insufficient;⁽⁴⁾ or who

vocability of the *Pacta Sucessoria*, yet we cannot subscribe to this opinion ; but continue to think that the analogy of our law, is in this respect very justly expressed in the *Costumen van Rhynland*, Art. 92.

In marriage contracts, we may also dispose by last will, and these dispositions have the force of a testament as other last wills have. See further, our notes on Pothier's Treatise on Contracts and Obligations, D. 1. p. 142—145.

(1) V. D. Keessel. Thes. 62. et 63.

(2) De Groot, Inleid, B. 1. D. 5. S. 3.

(3) De Groot, Inleid, B. 1. D. 5. S. 3. n. 7. Bynkershoek, quæst. Jur. priv. lib. 2. cap. 1.

(4) Voet, ad. tit. ff. de rit. nupt. n. 6.

labour under an incurable bodily infirmity, or incapability to beget children.⁽¹⁾ Again: marriage is prohibited, between those who, first, are too nearly related in blood or affinity. In the direct ascending and descending lines, marriage is absolutely prohibited, *in infinitum*; but in the collateral line, between persons of the second and third degree, consequently between brothers and sisters, uncles and nieces, aunts and nephews, and with respect to relations by affinity or marriage, this prohibition is equally extensive.⁽²⁾ Though under the ancient government, examples are to be found of dispensations to persons within these degrees,⁽³⁾ but such cases are rare, and the law was not lightly departed from. However, after the year 1795, they became more frequent, even in those degrees which had not before been thought of. Whether it would not be better on this head to have a definitive and precise law, and not to depart from it, than to leave it open to uncertainty and irregularity, we leave rather to the determination of others. Again, marriage is not only forbidden between those who

Prohibited
Marriages.

(1) De Groot, Inleid, B. 1. D. 5. S. 4. Lybrechts, Reden. Vort. over't. Not. Ambt. D. 1. Hoofdst 12. S. 16. p. 176.

(2) De Groot, Inleid, B. 1. D. 5. S. 5. 13. Regtsgel Observ. D. 4. Obs. 3.

(3) Examples of this are to be found collected in Regtsgel. Observ. d. 1.

**Prohibited
Marriages.**

have previously lived in a state of adultery, but even punishable;⁽¹⁾ and such marriages are not even permitted by dispensation.⁽²⁾ With respect to the marriages of parties who have eloped, there was a strong prohibition in Holland;⁽³⁾ which, however, was afterwards very much relaxed, when the consent of parents subsequently is obtained.⁽⁴⁾

Under the head, also, of difference of religion, the marriages of Christians with Jews or Mahometans was forbidden.⁽⁵⁾ Those between Lutherans and Papists were subject to heavy penalties; but this law is now repealed⁽⁶⁾. Also, no guardian or curator may intermarry with his ward, or the person placed under his care, till after his accounts are passed and closed.⁽⁷⁾

**II.
Consent of
Parents.**

3. If the parents of the parties who wish to intermarry are alive, their consent must be previously obtained; but in this the following things are to be observed, and distinctions taken. 1st. There is a difference between the

(1) Plac. Holl. 18 July 1674. Bynkershoek quæst. Jur. Priv. Lib. 2. Cap. 10. Regtsgeel Observ. D. 1. Obs. 11.

(2) See examples of this in Gr. Plac. boek. D. 7. p. 812, and D. 9. p. 372 and 384.

(3) Plac. Holl. 25 Feb. 1751, in G. P. B. D. 8. p. 535.

(4) Resol. Holl. 26 June 1783, and G. P. B. D. 9. p. 375.

(5) Arntzenii, Inst. Jur. Belg. Civ. part 2. tit. 3. S. 55.

(6) Plac. Holl. 24 Jan. 1755, and Decreet Van 6 March 1795.

(7) V. D. Keessel. Thes. 74.

case of minors and majors; *i. e.* minors, or young men under twenty-five years, and maidens under twenty years. In the latter case, the publication of banns, or marriage proclamations, is not granted without proving the *previous* consent of their parents.⁽¹⁾ 2d. By parents in this matter is understood father and mother, and by no means grandfather or grandmother, much less any remoter relations in the ascending or collateral line;⁽²⁾ but to all persons above these respective ages of twenty-five and twenty years, the publication of banns is permitted, and the parents are summoned by the magistrate or college to whom marriage cases are specially committed, to show cause to the contrary.⁽³⁾ If they do not appear within fourteen days from this summons, this is held for a tacit consent.⁽⁴⁾ The sufficiency of the reasons of the parents to forbid the marriage is determined by the judge. These are mostly founded upon some public bad conduct⁽⁵⁾ of one of the parties. When these reasons are held sufficient, in which at least two thirds of the court or college must concur, the marriage does not take place, and from such decision no appeal

II.
Consent of
Parents.

(1) Polit. Ordonn. Van 1580. Art. 3.

(2) Plac. Holl. 31 July 1671.

(3) Pol. Ord. d. Art. 3.

(4) Pol. Ord. d. Art. 3.

(5) Arntzenii, Inst. Jur. Belg. Civ., Part 2, Tit. 3. S. 21,

II.
Consent of
Parents.

lies; whereas, on the contrary, if the reasons of the parents are held insufficient by the court, they are allowed to appeal.⁽¹⁾ With respect to the consent of guardians, we are of opinion that at common law it is not necessary, but only in the case of some special local law.⁽²⁾

III.
Solemnities of
Marriage.

3. The solemnities to be observed in celebrating the act of marriage, in order to render it binding, must now be considered; and they are as follow :

1st. A declaration before the magistrates or commissaries for marriage causes, of the wish of the parties to intermarry, and request of the three Sundays' publication of the banns.⁽³⁾

2dly. The payment of the duty on marriages, which is regulated by the condition or means of the parties, or their parents; and is thirty, fifteen, six, or three guilders, according to circumstances.⁽⁴⁾

3dly. The marriage, banns, or proclamations, which are three in number,⁽⁵⁾ and must run without interruption. These are published at

(1) Edict. Hol. 27 Sept. 1663. from G. P. B. 3 D., p. 505. Bynkershoek. Quæst. Jur. priv., Lib. 2, Cap. 5.—Zurck, Cod. Bat. Voce Appel, S. 59.

(2) De Groot, Inleid, 1 B. 8 D., S. 3. Bynkershoek, Quæst. Jur. priv., Lib. 2. Cap. 3. V. D. Keesel Th. 125 and 126.

(3) Pol. Ordonn. Art. 3.

(4) Ordonn. on the Duties to be paid on Marriages and Funerals, 26 Octob. 1695. Public. 3 Dec. 1695.

(5) Pol. Ordonn. Art. 3.

the court-house, or in the church, in the domicile of the bride and bridegroom, or where, within a year and a day, they last lived.⁽¹⁾

III.
Solemnities of
Marriage.

These publications run from eight to eight days; unless, for very weighty reasons, it be permitted to publish two or three in one day.⁽²⁾

When any person thinks, that because of a previous contract, or for other reasons, he has a right to oppose the marriage, he applies to the judge, or proper authority, and enters a caveat against the marriage;⁽³⁾ whereon the usual proceedings take place, and an appeal lies.⁽⁴⁾

4thly. After the regular and uninterrupted publication of the bans, follows the completion of the marriage. Formerly, this act, with respect to persons of the Reformed Religion, was performed by a minister in the church; and when the parties were of a different religion,⁽⁵⁾ by a magistrate at the court house. But now, in all cases, it is celebrated by the magistrate.⁽⁶⁾ Yet, many persons abiding by the old custom,

(1) Arntzenii, Inst. Jur. Belg. Civ. Part 2. Tit. 3. S. 59.

(2) Loenius, Decis et Observ. Cas. 79. ibique Boel, in not. pag. 513-528.

(3) Arntzenii, Inst. Jur. Belg. Civ. d. l. S. 61.

(4) V. D. Keesel. Thes. 81.

(5) Pol. Ord. Art. 3. Arntzenii d. l. S. 64 Seqq.

(6) Public Holl. 7 May 1795.

III.
Solemnities of
Marriage.

still follow it by the ceremony in church ; but this is optional, and not necessary.

A marriage wherein the above solemnities are not observed is null and void.⁽¹⁾

SECT. VII.

Consequences of
Marriage.

The consequences of a marriage thus lawfully contracted, so far as they are not avoided by a special antenuptial contract, have relation either to the person or the goods of the parties.

Marital
Power

The personal consequences of the marriage (since it is not necessary here to speak of the obligations of mutual love, or of the providing for the *support* of the expenses of the marriage state, &c.) consist principally in the marital power, or the power of the husband over the wife. The wife becomes by marriage, as it were, a minor;⁽²⁾ and the husband, her curator or guardian : she has no power to appear in court;⁽³⁾ she is not capable of herself to enter into any contract without the knowledge or consent of her husband, so as to bind her to others,⁽⁴⁾ except so far as she may clearly appear thereby to have derived an advantage or profit;⁽⁵⁾ or that she, with the knowledge of her husband,

(1) Pol. Ordonn. Art. 13.

(2) De Groot, Inleid. 1 B. 5 D. S. 19.

(3) Voet, ad tit ff. de judic. n. 14. 19.

(4) Voet, ad tit. ff. de rit. nupt. n. 42.

(5) De Groot, Inleid. 1 B. 5 D. S. 2.23. n. 38.

has carried on trade openly.⁽¹⁾ But, on the other hand, one consequence of this power of the husband over the wife is, that she is bound and liable for all debts and engagements contracted by her husband, even without her knowledge, and equally with him during the marriage, and after his death, for one-half thereof,⁽²⁾ except the obligation arises from some crime on the husband's part;⁽³⁾ and, lastly, the husband may at his pleasure alienate or incumber the wife's property, without her consent thereto.⁽⁴⁾ If, however, the husband make such a manifest misuse of the marital power as is likely to bring the wife to poverty, the law affords her the means of checking him.⁽⁵⁾ The most usual step in such a case, at present, is a petition that the husband's person and property may be placed under curatorship.

Marital
Power.

(1) De Groot d. S. 23. Voet, ad tit. ff. de rit. nupt. n. 44 seqq.

(2) De Groot, d. l. S. 22. S. Van Leeuwen, Cens. For. part. 2. Lib. 1. Cap. 11. n. 6 and 7.

(3) Loenius, Decis. et observ. Cas. 103. pag. 669 seqq.

(4) De Groot, Inl. 1 B. 15 D. S. 22. Voet, ad tit. ff. de fund dot. n. 7 and 8.

(5) De Groot, d. l. S. 24. Sent. van den. Hoog et Prov. Raad, n. 135. S. Van Leeuwen, Cens. For. part 1. Lib. 1. Cap. 12. n. 7 ibique de Haas in not. Voet, ad tit. ff. de fund. dot. n. 7 et sol. matr. n. 2.

SECT. VIII.

Communi-
ty of
Goods.

With respect to the community of goods between man and wife, when not limited or excluded by a previous marriage contract, the law is, that this community takes place immediately⁽¹⁾ on the completion of the marriage;⁽²⁾ for it is an established rule with us, that man and wife have no separate property;⁽³⁾ and so true is this, that the community once introduced by marriage can in no wise afterwards be done away with.⁽⁴⁾ Nor does it make any difference whether it be the first or second marriage of the parties.⁽⁵⁾

There are only two cases wherein this community does not take place by marriage—1st, in

(1) The various opinions concerning the origin of this law are to be found in Arntzenius, *Inst. Jur. Belg. Civ. Part 2. Tit. 4. S. 4.*

(2) De Groot, *Inleid. 2 B. 11 D. S. 8. Regtsgeel Observ. 2 D. Obs. 32.*

(3) A. Matthæi, *Parœm. 2.*

(4) Arntzenii, *Inst. Jur. Belg. Civ. Part. 2. Tit. 4. S. 10.*

(5) *Decis, en Resol. v. d. Hove. v. Holl. n. 155 et 422; Voet, ad tit. ff. de rit. nupt. n. 89 et 123.* It is clear that by our law this community of goods also takes place in second marriages; but is this reasonable when there are children by the former marriage? Should there not be some limit to this law? This is another question, concerning which the observations of Bynkershoek, *Quæst. Jur. Priv. Lib. 2. Cap. 2.* seem to deserve consideration; and of Barel's, *Over eenighe aloude gebruiken in de Rechtsoeffening. Hoofdst 1.*

clandestine marriages of minors;⁽¹⁾ and 2d, in marriages between parties who have eloped.⁽²⁾ Community of Goods.

This community of goods by marriage extends to every thing possessed by the parties on either side, at the time of marriage, or acquired by them during marriage, whether by inheritance, legacy, donation, or otherwise; also all that which is comprehended under the name of *winst* or profit;⁽³⁾ and no property of any kind is excepted, but such as after the death of the party possessing it, or the expiration of some limited time, is to revert to a third person, and thus by its nature incapable of coming into community. Of this kind are fiefs in law, as well as hereditary fiefs.⁽⁴⁾

Further, property which, after the death of the present possessor, goes to the *eldest* in descent of the family;⁽⁵⁾ also goods affected with a trust, and the like.⁽⁶⁾

And as the parties enjoy alike the profit or gain made during marriage, so are they also equally affected by all the losses and charges of the property on either side, among which are to be reckoned the debts, not only those con-

(1) Placaat van Keizer Karel, van 4th Octob. 1540. Art 17. Pol. Ord. Art. 13.

(2) Plac. Holl. 25th Feb. 1751.

(3) Voet, ad tit. ff. de rit. nupt. n. 68, 70.

(4) V. D. Keessel. Thes. 220.

(5) Arntzenii, Inst. Jur. Belg. Civ. Part 2. Tit. 4. S. 18. n. 3.

(6) De Groot Inleid. 2 B. 11 D. n. 8.

Community of Goods.

tracted during marriage,⁽¹⁾ but also those with which either of the parties was affected before marriage.⁽²⁾

The consequences of the community of goods thus established are as follow: 1st, the goods of both parties, brought into community at the marriage, as well as those after acquired, are, during the marriage, common.

2. This property, during marriage, is under the controul and disposition of the husband.

3. All debts contracted before the marriage are common, and must be paid out of the common estate.

4. At the death of either of the parties, this community of goods ceases *ipso jure*; and 5th, the common goods of the husband and wife are then divided into two parts, the one-half assigned to the survivor, and the other half given over to the heirs of the deceased party.⁽⁸⁾

SECT. IX.

The Dissolution of Marriage.

Marriage is dissolved by death, and by a divorce in law.⁽⁴⁾ The latter takes place with us for two causes. 1st. for adultery;⁽⁵⁾ 2nd. for malicious desertion.⁽⁶⁾

(1) Arntezenius, d. 1. S. 26.

(2) Rechtsgel. Observ. 3 D. Observ. 37.

(3) De Groot, Inleid, B. 2. D. 11. S. 13.

(4) De Groot, Inleid, B. 1. D. 5. S. 18.

(5) Pol. Ord. Art. 18.

(6) Voet. ad tit. ff. de divort. n. 9.

Causes of any other kind, however strong they may appear, are not with us a sufficient ground of divorce. If, however, such causes can by an extended interpretation be brought within the reason of the two first causes, they are held sufficient. Thus the commission of an unnatural crime,⁽¹⁾ or perpetual imprisonment, &c. ⁽²⁾ are good grounds of divorce.

The Dissolution of Marriage.

Besides the divorce, which entirely dissolves the marriage, there is also with us a kind of provisional separation, introduced from the Canon Law,⁽³⁾ termed *a separation of bed, board, cohabitation, and goods*.

Separation à mensa et thoro.

This can, no more than a divorce, be effected by the mere private agreement of the parties.

Lawful reasons must be set forth in the application, tending to show, that the continuing to live together is dangerous or at least insupportable.⁽⁴⁾ In this proceeding, the intervention of the authority of the judge is requisite, who, after a summary inquiry may confirm the agreement in this respect.⁽⁵⁾

(1) H. Noodkerk, dissert. de matrimoniis ob turpe facinus. jure Solvendis.

(2) See our Verzameling van Gewijsden, D. 1. Cons. 32.

(3) J. H. Boehmer, in Jur. Eccles. Protest. Lib. 4. tit. 19. n. 49. seqq.

(4) Bynkershoek, quæst. Jur. Priv. Lib. 2. Cap. 9. Leyse. Medit. ad ff. Tom. 5. Spec. 316.

(5) In proportion as magistrates are particular, and oftentimes unnecessarily difficult in consenting to the dissolution of

Separation
à mensa et
thoro.

As to the consequences of this separation, if it includes at the same time a division of the goods, and is duly published, the community of goods induced by law on the marriage is suspended, and the marital power of the husband thereby ceases.⁽¹⁾ However, should the parties come together again (in the hope of which all separations take place,) the former rights and consequences of marriage revive.

SECT. X.

Second
Marriages.

After a dissolution of the marriage by the death of one of the parties, the survivor is at liberty to marry again ; and in cases where the marriage has been dissolved on account of adultery, or malicious desertion, the innocent party may contract a second marriage. But is it also permitted to the guilty party to marry again, while the other remains unmarried? There

marriages, they are, on the other hand, in general too negligent and easy in the confirming of separations, without sufficiently inquiring what secret or unlawful motives may have given rise to them, and how distressing the consequences may be to both or one of the parties. On this head we recommend to all magistrates, a strict examination into those causes, to relieve themselves from all responsibility ; and we quote here, with pleasure, the following observation of President Van Bynkershoek, d. l. “ It were to be wished that, from the too easy compliance of the magistrates, separations were not so frequent as they at present are.”

(1) Bynkershoek, d. l.

is no law which prohibits this,⁽¹⁾ except it be to the person with whom the adultery was committed.⁽²⁾ Second Marriages.

By the Roman law various penalties were enacted against second marriages, which have not been admitted with us;⁽³⁾ but a man or woman marrying again, having children by a former marriage, may not give to each other during their life, or by a last will, more than the least portion which is left to any one of the children of the former marriage; for all that is given or bequeathed beyond this, is taken and added to the shares of the children by the first marriage.

This law is known by the name of the *Lex hac edictali*,⁽⁴⁾ and such portion is therefore called a *filiale partie*, or child's share.

(1) Bynkershoek, Quæst. Jur. Priv. Lib. i2. Cap. 10.

(2) Plac. Holl. 18 July, 1674.

(3) Bynkershoek, Quæst. Jur. Priv. Lib. 2. Cap. 4.

(4) L. 6. C. de sec. nupt. De Groot, Inleid, B. 2. D. 12. S. 6. and D. 16. S. 7. Voet. ad tit. ff. de rit. nupt. n. 110. et seqq.

CHAPTER IV.

On the Paternal Power.

SECT. I.

**Paternal
Power.**

THE influence of society on the state of men is also remarkably shown in the difference which subsists between those who are their own masters, and those who are subject to the controul of parents, guardians, and curators.

With respect to the power of parents over their children, ours differs very much from the extensive paternal power exercised by the Romans.⁽¹⁾

This parental power with us is not only possessed by the father, but also by the mother, and after the death of the father by the mother alone.⁽²⁾ It consists in the entire direction of the maintenance and education of their children, and the management of their estate.

It gives also to the parents the right to exact reverence and obedience, and in cases of impro-

(1) De Groot, Inleid, B. 1. D. 6. S. 3. n. 5.

(2) Voet, ad tit. ff. de his. qui sunt sui vel al. Jur. n. 3.

per conduct to inflict such moderate chastisement as may induce amendment.⁽¹⁾ Paternal Power.

Children cannot proceed at law against their parents without leave of the court, which is termed *Venia Agendi*.⁽²⁾

No marriage can be entered into by children without the consent of the parents.⁽³⁾ The parents are entitled to appoint guardians for their children by will.⁽⁴⁾ The children cannot, while minors, bind themselves to a third person without the consent of their parents.⁽⁵⁾ However, the children, male and female, when of the age of fourteen and twelve years respectively, may dispose of their property by will.⁽⁶⁾

SECT. II.

This paternal power is acquired, first, by a lawful marriage. Children born out of wedlock, are not under the power of the father; but are nevertheless subject to that of the mother, as, by our law, the mother makes no bastard.⁽⁷⁾ 2ndly, by the legitimation of natural How acquired.

(1) Voet, d. l. Arntzenii, Inst. Jur. Belg. Civ. part. 1. Tit. 13. S. 5. and 6.

(2) L. 4. S. 1. and seqq. ff. de in jus. voc. Voet, ad eund. tit. n. 6. seqq.

(3) Pol. Ordonn. Van 1580. Art. 3.

(4) Voet, ad tit. ff. de test. tut. n. 1.

(5) De Groot, Inleid. B. 1. D. 6. S. 1. n. 2.

(6) De Groot, d. l. S. 5. n. 6.

(7) A Matthæi, Paroem. 1.

How ac-
quired.

children, which is effected either by subsequent marriage with the mother, or by a special favour of the sovereign.⁽¹⁾ The latter is granted chiefly in cases where, by the death of one of the parties, the legitimation by subsequent marriage becomes impossible.⁽²⁾ It is, however, subject to this condition, that the children are not born in incest or adultery, to whom legitimation is very rarely, and only for very weighty reasons, granted.⁽³⁾

The acquisition of the paternal power, by adoption, is not in use with us.⁽⁴⁾ Whether, however, this custom might not be just, and tend to the advantage of many poor orphans, seems to be a question deserving consideration.

SECT. III.

How it
ends.

The parental power ceases, 1st, by the death of the parents,⁽⁵⁾ in which case, if the children are yet minors, the paternal power is] converted

(1) De Groot, Inleid, B. 1. D. 12. n. 9. Voet, ad tit. ff. de concub. n. 4. et seqq.

(2) V. Alphen. Papeg. 2. D. 45. Hoofdst. Loenius, Decis. and Observ. Cas. 58. Zurck, in Cod. Bat. Voce Legitimatie, S. 2. n. 4. and 8.

(3) See Verhand. over de Judie. Pract. 4. B. 7. Hoofdst. S. 4. n. 2.

(4) De Groot, Inleid. B. 1. D. 6. S. 3. in fine. Stockmans Decis Brabant 69. Zurck, in Cod. Bat. Voce Adoptie.

(5) Voet, ad tit. ff. de adopt. n. 9.

into that of guardians. 2nd. By the lawful marriage of the child, whereby the son becomes major, and the daughter passes from the paternal to the marital power,⁽¹⁾ and the effect of this is so great, that the daughter under age being once freed from the power of the father by a marriage, which happens to be dissolved by the death of the husband during her minority, does not return under the paternal power.⁽²⁾ 3rd. By majority, whether attained by arriving at the age of twenty-five years,⁽³⁾ or full age in law, or by favour of the sovereign, which is termed *Venia Ætatis*.

How it
ends.

This writ is at present granted, by the authority vested for this purpose in the provincial department⁽⁴⁾, on letters from the magistrate of the domicile, who is accustomed previously to hear the parents on this matter, and does not grant his letters of recommendation to males

(1) De Groot. Inl. B. 1. D. 6. S. 4. Groenewegen, de Leg. abrog. ad. S. ult. Inst. de patr. potest. Heemskirk, Bat. Arc. p. 140.

(2) De Groot, d. l. P. Voet, ad tit. Inst. quib. mod. jus. patr. Solv. S. ult. in fine. Zurck, in Cod. Bat. Voc. Houwelijk, S. 7.

(3) Groenewegen, de Leg. abrog. ad. pr. Inst. quib. mod. jus. patr. pot. Sol. S. V. Leenwen, R. H. R. 1. B. 13. D. S. 6.

(4) Staatsregeling, van Octob. 17th, 1801. Art. 71.

How it
ends.

under the age of twenty, or females under eighteen years.⁽¹⁾

4th. By tacit or indirect emancipation.⁽²⁾ When the children, with the previous knowledge of the parent, take up a residence elsewhere, and exercise openly any trade or calling.⁽³⁾

(1) See Verhand. over de Judie. Pract. 2. D. 4. B. 7. Hoofdst. S. 5.

(2) Positive or direct emancipation, though not without examples in Holland, (See Regtsgel. Obser. 2. D. Obs. 7. and 4. D. pag. 231—234.) is however, not now in use, since the *Venia ætatis* has rendered the same unnecessary.

(3) De Groot, Inl. B. 1. D. 6. S. 4. n. 11. Voet, ad tit. ff. de adopt. n. 12.

CHAPTER V.

Of Guardians and Curators.

SECT. I.

THE state of those who are their own masters is very different from that of those who on account of their youth, or some mental, or corporeal incapacity, are subject to the care and government of others.

Who may
be a Guar-
dian.

This care or government is termed *Guardianship* or *Curatorship*.*

Orphan children under twenty-five years of age, are placed under guardianship.⁽¹⁾

According to the general rule, every one who is appointed guardian is bound to accept it, and

(1) De Groot, Inleid. B. 1. D. 7. S. 3. Regtsgel, Obs. D. 2. Obs. 8.

* In the English Law, such curator is in cases of Idiocy and Lunacy, termed the *Committee of the Person*; but the appointment of a curator to a person, as a *Prodigal*, who is likely to bring himself and family to ruin, seems to be unknown to the English Law.—T.

Who may
be a Guar-
dian.

in case of refusal, may be constrained by Gyze-
ling.*⁽¹⁾

Some persons, however, are prohibited from becoming guardians, and others are privileged to decline it.

Among the prohibited persons, are those, especially, who are themselves under guardianship or curatorship,⁽²⁾ also all females,⁽³⁾ except the mother and grandmother, who so long as they do not marry again, are admissible to the guardianship of their children or grandchildren, sometimes with the addition of a co-guardian when requisite.⁽⁴⁾

Military persons are not prohibited, but may excuse themselves from this office ;⁽⁵⁾ debtors or creditors of the estate of the children for a considerable sum may, according to the discretion of the judge, be removed from acting as guardians.⁽⁶⁾ Clerks in the secretary of state's

(1) Pr. Inst. de excus. tut. De. Groot, *Inl. B.* 1. D. 7. S. 15.

(2) S. 2. Inst. qui test. tut. dari. S. 13. Inst. de excus. tut.

(3) L. 16. 18. ff. de tutel. L. 26. ff. de test. tut. L. 2. 73. ff. de R. J.

(4) De Groot, *Inl. B.* 1. D. 7. S. 11. V. D. Keessel, *Thes.* 122.

(5) V. D. Keessel. *Thes.* 113.

(6) Voet, ad tit. ff. de tutel. n. 4.

* But see the reference under Note (2) where this doctrine seems to be qualified ; and it is to be understood as applicable only to guardians appointed by the Court, and not by last will.

or revenue department cannot, without the knowledge of their principal, undertake this office.⁽¹⁾

Who may
be a Guar-
dian.

The grounds on which certain persons may be excused from this office are left to the discretion of the judge;⁽²⁾ for example, those who are already burthened with three guardianships, or who are above seventy years of age, or who, from sickness or bodily infirmity, are hardly able to attend to their own affairs, &c.⁽³⁾

When, however, the reasons adduced by the party why he should be excused, are held insufficient, and he thinks himself aggrieved thereby, an appeal lies, and in the mean time another guardian is provisionally appointed.⁽⁴⁾

SECT. II.

The appointment of guardians may be made by will or codicil,⁽⁵⁾ or by special act of guardianship,⁽⁶⁾ executed either by father or mother as well at the death of the former as of the latter.

Appoint-
ment of
Guardians.

(1) Resol. van Gecomm. Raaden. 1 Feb. 1724. G. P. B. 6 D. pag. 42.

(2) S. Van Leeuwen, Cens. For. Part 1. Lib. 1. Cap. 16. n. 20. Voet, ad tit. ff. de excus. tut. n. 12.

(3) D. D. ad tit. Inst. et ff. de excus. tut. Lybregts. Red Vert, over't Not. Ambt. 1 D. 30 Hoofdst n. 16.

(4) De Groot, Inleid. 1 B. 7 D. S. 14.

(5) De Groot, Inleid. 1 B. 7 D. S. 7. n. 5. and 2 B. 14 D. S. 5.

(6) Ordonn. Van't Zegel van. 1794. Art. 53.

Appoint-
ment of
Guardians.

When the parents have not provided a guardian, this provision is made by the orphan chamber of the domicile of the deceased parent ; or if this chamber is expressly excluded by the will,⁽¹⁾ then, by the judge,⁽²⁾ who is accustomed to appoint the nearest relations, if fit persons.⁽³⁾ That this provision may not be neglected, it is the universal rule in all cases of the death of parties who leave children, to summon the executors or administrators to produce the will at the orphan chamber.⁽⁴⁾

Strangers who leave any estate or legacy to the children of others may appoint guardians for them ; but this is not a *personal* guardianship which concerns the maintenance and education of the children, but a real guardianship, regu-

(1) It has always been a great matter of surprise to us and many others, that people are so bent on excluding the orphan chamber in their wills. Does not a public administration, guaranteed, as it were, by the department itself, deserve by far to be preferred to the administration of private persons, of whose faithless and negligent conduct so many melancholy proofs are daily met with ? Observations very worthy of remark, on this head, are to be found in the *Vaderl. Letteroeff.* 1791. No. 11. *Mengelw. blad.* 475. en volgg.

(2) Voet, ad tit. ff. de tut et cur. dat. n. 5.

(3) V. D. Keessel. Thes. 117.

(4) De Groot, *Inleid.* 1 B. 7 D. S. 13. This is also confirmed by almost all the laws relating to orphans in our towns and villages.

lating the administration of the property so bequeathed.⁽¹⁾ Appointment of Guardians.

SECT. III.

The duty of a guardian consists, in the first place, in making an inventory of the goods of the children,⁽²⁾ or in demanding this from the surviving parent who remains in possession.⁽³⁾ Duty of Guardians.

The giving of security by the guardian is now with us nearly out of use, though in some cases, for sufficient reasons, the judge may require it.⁽⁴⁾

The authority and controul of the guardian is either over the person or the property of the ward. With respect to the person, the guardian must take care that the ward be properly maintained, according to his estate, and educated in such a way, that when he becomes of age, he may be able to obtain a suitable livelihood.⁽⁵⁾

With respect to the property, he must exercise the same care for the preservation of all that is of substantial value, as a good father of a family would over his own. When the orphan chamber is not excluded, the property of the ward is

(1) V. D. Keessel. Thes. 118.

(2) De Groot, Inleid. 1 B. 9 D. S. 3.

(3) V. D. Keessel. Thes. 135.

(4) De Groot, Inleid. 1 B. 9 D. S. 1. Voet ad tit. ff. de adm. et per tut. n. 2.

(5) De Groot, Inleid. 1 B. 9 D. S. 9.

**Duty of
Guardians.**

placed under its care;⁽¹⁾ otherwise, the guardian has the charge of it. But where there are several guardians, it is most prudent to keep it (if of that nature) in a particular chest, to which, one, without the other, cannot have access.

He must also collect and call in, with the greatest diligence, the outstanding debts,⁽²⁾ and the cash in hand must be laid out in government securities, yielding interest.⁽³⁾ Other sorts of investment on security, as mortgages⁴ and the like, however secure they may be, require the previous sanction of the court,⁽⁴⁾ in order to protect the guardian, in case of unforeseen loss, from becoming personally liable.

Such previous sanction of the court is also necessary generally to the guardian in all transactions of importance; for example, in the continuing or discontinuing of any trade or business.⁽⁵⁾

In the compromising of any doubtful claim or matter⁽⁶⁾ and the like.

(1) *Rechtsgel. Observ. 3 D. Obs. 12.*

(2) *Voet, ad tit. ff. de adm. et per. tut. n. 8.*

(3) *Regtsgel. Observ. 3 D. Obs. 13. V. D. Keessel, Thes. 155.*

(4) *De Groot, Inleid. 1 B. 2 D. S. 2.*

(5) *Voet, ad tit. ff. de adm. et per. tut. n. 11.*

(6) *Voet, ad d. t. n. 13. et ad. tit. ff. de transact. n. 2.*

The office of guardian is indivisible, and each is responsible for the acts of the other.⁽¹⁾ Duty of
Guardians.

SECT. IV.

Of a more or less special nature is the duty Inventory. of guardians, with respect to the inventory of the property to be made by the surviving parent when about to enter upon a second marriage; and so also are the consequences of guardianship when the surviving parent remains in possession, with the children, of the common property, without any division having been made, as *Boedelhouder*.*

With respect to the first or *vertigting*, or *verweeging*, as it is termed, when the surviving parent is about to enter upon a second marriage, the obligation is imposed on the party, by law, to furnish to the children by the first marriage, as a preliminary step, a statement or inventory of their rights in the property of the deceased parent.⁽²⁾ For this purpose, the surviving parent, with the next of kin of the children, as guardians thereto *chosen*, makes an

(1) De Groot, Inleid. 1 B. 9 D. S. 11.

(2) Regtsgel. Observ. 1 D. Obs. 15.

* When the parties marry in the community of goods, the surviving parent is entitled to one-half, and the children to the other, on the death of one of the parents, if they are not excluded by will; in which case, they have only their legitimate portion.—T.

Inventory act whereby the amount of this property is ascertained and declared, generally, with the condition that it shall remain in the possession of the parent until the children shall have attained their majority, to maintain them during this period from the *usufruct* or interest thereof.⁽¹⁾ In this case, the duty of the guardian is limited to the examination of this inventory; and for this purpose he is bound to make a strict inquiry into the property, in order to prevent the children being prejudiced by the valuation or statement; but when this is done, and the formal act completed, his duty in this respect ceases, for he has nothing to do with the order or disposition of the property itself.

Concerning this *boedelhouderschap*, or the surviving parent remaining in possession of the property, it is to be observed, that when the surviving parent, he being at the same time guardian, makes no inventory of the property or act of that nature, and does not purchase or redeem the interest of the children therein (*Uitkoop*), the consequence is that the community of goods still exists between the parent and the children, so far that the children enjoy one-half of all the profit made during this community, but are not subject to the losses, which

(1) De Groot, Inleid. 1 B. 9 D. S. 6. Iybrechts Red. vert. over't Not ambt, 1 D. 13 Hoofdst. V. D. Keessel. Thes. 142.—145.

fall entirely on the surviving parent ;⁽¹⁾ and this may be laid down as law with us when there are no local ordinances to the contrary.⁽²⁾ Inventory.

SECT. V.

The power of guardians consists in general in assisting and representing the ward in all transactions concerning him,⁽³⁾ and especially in appearing for him in law.⁽⁴⁾ Power of Guardians.

In some cases, however, the assistance of the guardian is unnecessary.

Thus, when the ward is arrived at the age of puberty, he may make a will without his guardian ;⁽⁵⁾ and with respect to marriage, if the law of the place does not expressly require it, the consent of the guardian is not necessary to its validity.⁽⁶⁾

In criminal cases, the ward must appear personally, at least so long as he is not received in ordinary process.*⁽⁷⁾

(1) De Groot, Inleid. 2 B. 13 D. V. D. Keessel. Thes. 266. et Seqq.

(2) Regtgel. Obs. 3 D. Obs. 40.

(3) De Groot, Inleid. 1 B. 8 D. Voet, aliiq. D. D. ad tit. ff. de auct. et cons. tut.

(4) De Groot, d. l. S. 4 n. 6.

(5) De Groot, d. l. S. 2.

(6) See above, page 82.

(7) Stijl van Proced. in Crim. Zaaken, Art. 61., and there V. Leeuwen, in not.—Voet, ad tit. ff. de Jud. n. 12. V. D. Keessel, Thes. 127.

* See page 50 of the translator's "Report to Earl Bathurst on
on

**Power of
Guardians.**

In other cases also, the power of the guardian is remarkably limited by law. Thus he cannot sue or proceed at law in behalf of the minor without the previous authority of the judge; and if he proceeds without such authority, it is at the risk of paying the costs himself.⁽¹⁾ Neither can he sell or incumber the real property of the ward without a previous decree⁽²⁾ of

(1) De Groot, *Inl.* 1 B. 8 D. S. 4. n. 7. Merula, *Manier van Proced.* Lib. 4. Tit. 93. Cap. 4. n. 2. *ibique not.* Voet, *ad tit. ff. de adm. et per. tut.* n. 12.

(2) De Groot, *d. l.* S. 6. Voet, *ad tit. ff. de reb. eor.*

on the Criminal Code of Philip II.," in force at Demerary, printed in 1821, for Henry Butterworth, Fleet-street, London.

ARTICLE 61 (of the Code).

"And if the party accused is an infant or minor, his curator or guardian shall assist him in his defence; and if he have none, then the judge shall appoint him one for the purpose aforesaid."

Note on the above article :

"This is expressly enjoined by the Roman law, L. 4. *Cod. de Autoritate præstanda.* And in case the infant has no guardian, the judge must appoint him one *ex-officio*, Lex 11 *Cod. "qui petant tutor:"* whether the proceedings be in ordinary or extraordinary process.

"When the minor is a prisoner, the curator or guardian *ad lites* must be appointed him before he is examined on articles; for which purpose, in order to assist him with his advice, this guardian, contrary to the fifteenth article, must be allowed to have access to him before the hearing, although he is not permitted to be present at the hearing."

the court ;* and the same may be understood of government securities.⁽¹⁾

Power of
Guardians.

SECT. VI.

Under the head of guardianship, two actions lie at law, one against the guardian at the suit of the ward, and the other by the guardian against the ward.⁽²⁾

Actions
under the
Title of
Guardian.

The first action is given to the ward, or in case of death, to his representatives, against the guardian or his heirs, and against each guardian *in solidum* ; so that on full satisfaction by one, the other shall be freed, for an account and the giving over of the property in their hands, as also for the answering in damages all losses suffered by mal-administration.⁽³⁾

The other action lies for the guardian and his representatives against the ward, and those who succeed to his rights for payment of all disbursements and indemnity, as well as for a release on the foot of the accounts and transactions of the guardianship, and also for a reasonable compensation for his time and labour.⁽⁴⁾ The sum at which this shall be fixed, varies according to different usages and local customs.

(1) V. D. Keessel. Thes. 130.

(2) *Actio tutelæ directa et contraria*.

(3) Voet, ad tit. ff. de tut. et rat. distrah.

(4) Voet, ad tit. ff. de contr. tut. et util. act.

* As upper guardian.—T.

Actions
under the
title of
Guardian.

The general rule is to allow two and a half per cent. on receipts, and one and a quarter on payments, and one per cent. on the ready money found in the house, or in the possession of the defunct, or on goods sold, or money received by the redemption of rents, annuities, mortgages, or other obligations.⁽¹⁾

SECT. VII.

How guar-
dianship
expires.

Guardianship ends, 1st. By the death of the ward,⁽²⁾ in which case the guardian must account to his heirs.*

2ndly. By the death of the guardian,⁽³⁾ when the guardianship passes to those whom he has by his will appointed, if he has the power of surrogation, or on failure thereof to the Court.

3rdly. By the majority of the ward, which with us is twenty-five and twenty years, for males and females respectively.⁽⁴⁾

(1) Sententie van den Hoogen Raad van 28 Julii, 1725, to be met with in Lybregts, Red. Vert. over't. Not. ambt. D. 2. Bijl Z.

(2) S. 3. Inst. quib. mod. tut. fin.

(3) D. S. 3.

(4) De Groot, Inleid, B. 1. D. 10. S. 1.

* As the Dutch Law makes no distinction between personal and real property in this case, the word *heirs* is used in the translation.—T.

In some places, however, an express act of the magistrate is necessary.⁽¹⁾

How guardianship expires.

4thly. By the marriage of the ward.⁽²⁾

5thly. By the obtaining from the sovereign the writ of *Venia Ætatis*,⁽³⁾ which has been before noticed.⁽⁴⁾

6thly. By the cause which has given rise to the guardianship ceasing, as when this is limited to a certain and particular act.⁽⁵⁾

7thly. By the removal of the guardian on account of improper conduct, or unfitness for the office. This is left to the discretion of the Court;⁽⁶⁾ but if there is nothing which substantially affects the character of the guardian in the cause assigned for this removal,⁽⁷⁾ it takes place without prejudice to it.

SECT. VIII.

Thus far of guardians; we must now speak of *curators*. The office and duties of these are in

Curatorship.

(1) V. D. Keessel, Thes. 160.

(2) De Groot, d. l. S. 2. Voet, ad tit. ff. de minor, n. 6. Loenius, Decis et Observ. Cas. 124.

(3) De Groot, d. l. S. 3. Voet, ad tit. ff. de minor, n. 4.

(4) Bladz. 37.

(5) De Groot, d. l. S. 6. Huber. Hedend. Regtsgel. 1. B. 20. Kap. n. 17.

(6) De Groot, d. l. S. 4.

(7) Voet, ad tit. ff. de susp. tut. n. ult. V. D. Keessel, Thes. 162.

Curator-
ship.

general, the same with those of guardians.⁽¹⁾ The difference between them, seems confined substantially to these points :

1st. The foundation of all guardianships is minority : that of curators is founded on mental or corporeal incapacity, whereby any one is unfit to take care either of his property or person.

These incapacibilities are 1st. Insanity,⁽²⁾ in which case, if it approach to dangerous madness, the power of *confinement* is added to that of curatorship.

2ndly. Those who by the scandalous wasting of their property, are emphatically termed in our law, *prodigals*,⁽³⁾ and even with respect to these, sometimes, reasons may exist to justify personal confinement, as for example—if excessive drunkenness has led to their prodigality, or that there is reason to apprehend their being prevailed upon, in such fits, to antedate any act or obligation which they may execute.

In the next place, guardians may be appointed by private persons.

Curators only by the Court, on previous inquiry.⁽⁴⁾ Such appointment of curators also

(1) De Groot, Inleid, 1 B. 11. D. S. 35. Voet, ad tit. ff. de cur. fur. n. 1.

(2) Voet, ad d. t. n. 3.

(3) De Groot, d. l. S. 4. Voet, ad d. t. n. 6. et 7.

(4) De Groot, d. l. S. 4. n. 6. V. D. Keessel, Thes. 164.

requires proclamations and notice, to prevent prejudice to third persons who might deal, without notice, with the person thus placed under curatorship.⁽¹⁾ Curatorship.

Lastly, curatorship ceases only by order of the Court which has granted it.*

This order may not only be applied for in cases where the cause itself of the appointment has ceased ; but also when the party has, notwithstanding his opposition, been placed under curatorship, for he has the right, by petition to the Court, to traverse this order of curatorship, and on failure of redress to appeal.⁽²⁾

Besides the above mentioned curatorship over person and property, there is another kind of judicial provision, relating to property only, which is termed, not unaptly, *Sequestration* ; for example—to appoint a representative for an absentee in an inheritance, or to administer, and liquidate an estate, whereof the heirs are not known ; or in an abandoned estate, encumbered with debts, and the like.⁽³⁾ Sequestration.

(1) Voet, ad d. t. n. 8.

(2) See our Verhand, over de Judic. Pract. 1. D. 2. B. 24. Hoofdst. bl. 334.

(3) V. D. Keessel, Thes. 167.

* Quære as to case where the party is removed by his curator *non in fraudem*, to another jurisdiction, and there becomes *compos mentis*.—T.

CHAPTER VI.

Of the Rights of Men IN and TO things in general.

SECT. I.

Rights *in*
and *to*
things.

The second object of the law (*objectum juris*) regards things *in* or *to* which men are entitled.⁽¹⁾

We lay down emphatically this division that the rights of men are *in* things or *to* things, and that these rights are of distinct natures, and in their consequences widely different.⁽²⁾

The right *in* a thing (*Jus in Re.*) is that right whereby the thing itself is bound to me, so that I may pursue this right in the thing against any possessor whatsoever.

The right *to* a thing (*Jus ad rem vel in personam*) is that right whereby not the thing itself but the person with whom I have dealt is bound to me, so that I have only an action against him for the delivery of the thing contracted for, or

(1) S. Ult. Inst. de Jur. Nat. Gent. et Civ.

(2) Bockelman, in Tract de Action, Cap. 4. Heineccii, Recit. ad tit. Inst. de rer. div. pag. 206 et 207.

for the performance of the act stipulated; for example, you may be in possession of goods which are my property, then my remedy is against the goods themselves, and I reclaim them as mine, although they may have come into a third hand; but if I have lent you a sum of money, which you fail to repay at the stipulated time, then I have no right in any of your goods which form part of your estate, but merely a personal action against you to compel payment. In the first case, if your estate becomes insolvent, I reclaim, as owner, my property, which never formed part of your estate; but, in the second case, I come in as a concurrent creditor, *pro rata*, with the others.

Rights in
and to
things.

SECT. II.

The different kinds of right *in* a thing (*Jura in re*) are four in number; 1. the right of *property*; 2. the right of *inheritance*; 3. the right of *servitude*;* 4. the right of *pledge* or *mortgage*.⁽¹⁾

Different
kinds of
Jus in re.

Some writers have also added to this enumeration, though not with strict accuracy, the right of possession.⁽²⁾ However, on account of its special consequences, we shall notice it sepa-

(1) Huber. in Prælect. ad tit. Inst. de rer. div. n. 12.

(2) C. F. Walchii Introd. in Controv. Jur. Civ. Sect. 2. Cap. 1. S. 6.

* As, the right of way.—I

Different
kinds of
Jus in re.

rately after having treated of the four sorts of real rights just mentioned.

SECT. III.

Different
sorts of
rights to a
thing.

The rights to a thing (*Jura ad rem*), or personal rights, vary according to the extent of the cause or origin of the obligation from which they arise.

They may be reduced to four; 1. Those which arise from *contracts*; 2. from *quasi contracts*; 3. from *crimes*; 4. from *quasi crimes*.⁽¹⁾

Proceeding in this way, we shall dedicate the remaining part of the first book of this work to this inquiry.

(1) Pothier, *Verh. van Contracten en Verbintenissen*, 2 vols. in 8vo., which I translated and published, with annotations.

CHAPTER VII.

Of the Right of Property.

SECT. I.

PROPERTY is that right by which any thing is understood to belong to any particular person to the exclusion of all others.—This right is especially known by its consequences. Property, wherein it consists.

1. It comprehends the right to enjoy the fruits or profits of the thing.

2. The right to make such orderly use of the thing as the owner may think proper.

3. The right to alter or change the form of the thing at pleasure.

4. The right entirely to destroy the thing.

5. The right to prevent others from making use of it; and

6. The right to alienate or to make over to others any *other* sort of right in the thing; as, for example, the use of it.⁽¹⁾

When all these consequences do not unite, the right of property is not perfect. We must, however, qualify all this with the limitation, provided the object of the law, and the rights of third persons, are not affected thereby.⁽²⁾

(1) Pothier, *Traité du Droit de Domaine de Propriété*, Part 1. Chap. 1. n. 5.

(2) Pothier, *d. l. n.* 14.

SECT. II.

Right of
property,
how ac-
quired.

The ways in which this right of property is acquired are as follow :

I. Occupancy, or the simple taking of the thing. To this title it is requisite that the thing belongs to nobody,⁽¹⁾ or else a theft is committed.

Under this title, by occupancy, may be classed,

1. The right of the *chase* in wild beasts.⁽²⁾

In former times this right was, for the greater part, confined to the nobility, and those persons who had obtained it by special favour of the sovereign.⁽³⁾ At present less weight is attached to these exclusive privileges ; so that, among other things, every one is at liberty to pursue the chase on his own grounds.⁽⁴⁾

With respect to downs, and other open places, it was soon found that the unlimited exercise of the right of chase would have shortly destroyed the game, and therefore it was found necessary to return to the old laws and customs which existed before the year 1795.⁽⁵⁾

(1) L. 3. pr. ff. de acq. rer. dom.

(2) L. 1. S. 1. ff. eod.

(3) De Groot, Inleid. 2 B. 4 D. S. 25-31. Regtsgel. Observ. 1 D. Obs. 27-29, and 3 D. Obs. 30. J. Rendorp, Verhand. over het Recht van de Jagt (Amst. 1777), and J. Dierquens, Aanmerk, op't Zelve ('s Hage 1778).

(4) Public. Holl. 26 Jann. et 28 Julii 1795.

5) Public. Van't Uitr. Bewind. 28 Octob. 1799.

2. The right of *fowling*. In this respect also the ancient exclusive privileges of the nobles are considerably restricted,⁽¹⁾ and what we have observed of the right of chase is here equally applicable.⁽²⁾

Right of property, how acquired.

3. The right of *fishing* in the *sea*. This is free to all.⁽³⁾

So also in public rivers and waters, so far as angling.⁽⁴⁾ With respect to fishing with nets and other instruments, as also concerning the time when it is not lawful to fish, there are various laws and regulations,⁽⁵⁾ which, by the last enactments on this head, have been confirmed as still in full force.⁽⁶⁾

4. The finding of unowned goods, or of goods the property in which has been abandoned by the owner.

Also of shells and precious stones found on the sea-shore.⁽⁷⁾ Newly discovered islands.⁽⁸⁾ Treasure trove, or buried or concealed treasures,

(1) De Groot Inleid, 2 B. 4 D. S. 6-16. Regtsgel Observ. 1 D. Obs. 24. 3 D. Obs. 26, 27, and 28, and 4 D. Obs. 17.

(2) See the above quoted Public of 1795 and 1799.

(3) De Groot Inleid, 2 B. 4 D. S. 17.

(4) De Groot Inleid, 2 B. 1 D. S. 28, and 4 D. S. 18.

(5) De Groot Inleid, 2 B. 4 D. S. 23.

(6) Pub. Holl. 18 Aug. 1795, and 10 Feb. 1796. Publ. Van't Uitr. Bew. 28 Oct. 1779, Art. 15.

(7) L. 3. ff. de divis. rer. D. 1. n. 8.

(8) De Groot, Inleid. 2 B. 4 D. S. 33. V. D. Keessel Thes. 190.

Right of
property,
how ac-
quired.

found on one's own ground, and which belong entirely to the finder; but if found on the ground of another, he is entitled to the half, and the other half goes to the owner of the land.⁽¹⁾

Although the states have occasionally pretended to some right in this respect.⁽²⁾

That the owner has abandoned his property in the thing, must clearly appear; therefore we cannot acquire by occupancy stray beasts, or a lost purse of money, or other valuables,⁽³⁾ but are bound by public advertisement to give notice in the newspapers and to the magistrates, and to use such means in order to find the true owner, and more especially with respect to shipwrecked goods, or those found on the seashore, which, if converted, render us liable to a criminal action. The sailors or persons who find this property are entitled to place it in security, and the owners cannot reclaim it without paying the salvage.⁽⁴⁾

5. Booty acquired in war from the enemy.⁽⁵⁾

(1) V. D. Keessel Thes. 198.

(2) De Groot, Inleid. 2 B. 4 D. S. 38. Bort, Tract. Van de Domein. Van Holland. 7. D. n. 18. seqq.

(3) De Groot Inleid. 2 B. 1. D. S. 52.

(4) De Groot Inleid. 2 B. 4 D. S. 36. Placaat Holl. 22 Julii 1772, in 't G. P. B. 9 D. pag. 811.

(5) De Groot Inleid. 2 B. 4 D. S. 34.

However, in the distribution of this, the military and maritime law must be followed.⁽¹⁾

Right of
property,
how ac-
quired.

II. Another mode of acquiring property is termed *accession*, or the addition made to our property by its natural fruit, increase, or produce. Under this title we are equally owners and proprietors of what is thus produced, as we are of the property producing it: for example, the produce of our cattle, the fruits of our land, &c.⁽²⁾

The gradual addition made to our lands by the constant ebb and flood of the waters, we acquire under the title of *accretion* or *alluvium*.⁽³⁾

Also whatever is planted or erected on the ground of another, goes to the proprietor of the ground. So, whatever is done for the ornament or improvement of any particular thing, is to the profit of the owner of the thing, saving to the other his right to compensation.⁽⁴⁾

III. In most cases, the right of property is acquired by *delivery* or *conveyance*,⁽⁵⁾ and therein

(1) Voet. in Tract. de Jur. Milit. Cap. 5, et tit. ff. de acq. rer. dom. n. 8. Regstel. Observ. 3 D. 31. V. D. Keessel Thes. 191 and 192.

(2) S. 19. Inst. de rer. div.

(3) L. 7. S. 1. ff. de acq. rer. dom. De Groot Inleid. 2 B. 9 D. Regtsgel Observ. 4 D. Obs. 21-25.

(4) De Groot Inleid. 2 B. 10 D.

(5) L. 20. C. de pact.

Right of
property,
how ac-
quired.

a difference must be made between moveable and immoveable property.

Moveable property passes merely by delivery thereof, or of its symbol ; as, by delivery of the keys of the store or warehouse where it is deposited.⁽¹⁾ The delivery, however, of moveable property does not transfer the title or dominion. Either the purchase-money must be paid, or the purchase made (expressly) on credit.⁽²⁾

If the purchase be for ready money, and no payment be made, then the vendor within a short time, generally within six weeks, may reclaim the goods :⁽³⁾ whether this right of reclaiming the goods has place, if the vendee, who has bought on credit for a limited time fails soon after, and thus commits a manifest fraud, may be a question.⁽⁴⁾

In immoveable property the title does not pass, unless the conveyance or transport is made before the judge of the place where it is situate, and the government duties of two and a half per cent., with the addition of one-tenth, be paid.⁽⁵⁾

(1) S. 45. Inst. de rer. divis. L. 9. S. 6. ff. de acq. rer. dom.

(2) S. 41. Inst. de rer. divis. De Groot Inleid. 2 B. 5. D. S. 14.

(3) Regtsgel. Observ. 3 D. Obs. 33.

(4) Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 15. V. D. Keessel, Thes. 204.

(5) Regtsgel. Observ. 3 D. Obs. 32. Plac. van Keizer Karel of 10 May 1529. Ord. op den 40 penn. of 9 May 1744.

IV. Lastly, the right of property is acquired by prescription of time, by which must here be understood, undisturbed possession for the third part of a century.⁽¹⁾

Right of property, how acquired.

SECT. III.

The action which arises under the head of property is named *Reclame*,⁽²⁾ or *Rei Vindicatio*. It is a real action, which lies for the owner of any thing moveable or immoveable, corporeal or incorporeal, against the possessor or any person who has, *mala fide*, divested himself of the possession, to deliver it up to the owner, with all its fruits then in existence, and also those which the *mala fide* possessor has already enjoyed, or might have enjoyed, under the deduction, however, of the costs and charges of the possessor in the thing.⁽³⁾

Actions under the head of property.

SECT. IV.

How the right of property may be lost,⁽⁴⁾ may, in some respects, be seen from what we have already observed, in the second section of this chapter.

Right of property, how lost.

It takes place either with or against our

(1) De Groot Inleid. 2 B. 7 D. Matthæi Paroem. 9. Loenius. Decis en Observ. Cas. 76.

(2) Rei-Vindicatio.

(3) Voet, aliique D. D. at tit. ff. de rei. vind. Pothier, Traité du Droit de Propriété, Part 2. Chap. 1. pag. 449-486. De Groot Inleid. 2 B. 6 D.

(4) De Groot, Inleid. 2 B. 32 D.

Right of
property,
how lost.

consent. With our consent, by delivery or conveyance to another, or by its entire abandonment,⁽¹⁾ provided the intention to abandon clearly appears. Thus, for example: in cases of stormy or bad weather, the throwing of goods overboard to lighten the vessel does not amount to abandonment or relinquishment of the right of property.⁽²⁾

We lose our property against our will when it is taken in execution, or by order of the higher power for the advantage of the community. The latter, however, cannot take place without reasonable compensation.⁽³⁾

In like manner by *prescription qf time*.⁽⁴⁾ But this is not effected by the mere loss of possession, although we are ignorant what is become of the goods.⁽⁵⁾

Unless the goods were of that nature that originally they were no one's property; as, for example, in the case of beasts of the chase, over whom we lose our property after capture, when they escape.⁽⁶⁾

(1) L. 1. ff. pro. derel.

(2) L. 9. S. 8. ff. de acq. rer. dom. L. 8. ff. de Leg. Rhod.

(3) This is named *Jus dominii eminentis*, concerning which, see Bynkershoek, Quæst. Jur. Publ. Lib. 2. Cap. 15. S. De Cocceii, Dissert. Proëmial ad Grotium, de J. B. ac P. Diss. 12. S. 629. n. 2. pag. 560.

(4) L. 20. C. de pact. t. t. ff. de præscript.

(5) L. 44. ff. de acq. rer. dom.

(6) L. 3. S. 2. L. 5. L. 14. S. 1. ff. de acq. rer. dom.

CHAPTER VIII.

Of the Right of Inheritance in general.

SECT. I.

The second sort of real rights, or rights *in* a thing, is the right of inheritance, by which, when a party is entitled to an estate, or to part of it, or by legacy has acquired a title to any thing, he succeeds to all the rights of the ancestor or testator, so that the property acquired by these titles becomes a new species of property.⁽³⁾

Right of inheritance.

This property, however, by inheritance or legacy, is not acquired with us, or cast upon us, solely by descent, or under the will, *ipso jure*, but must be entered upon or accepted by a positive act.⁽²⁾

SECT. II.

Inheritance is also of two kinds, either by last will, or *ab intestato*; and we shall treat of each in the two following chapters.

Of two kinds.

(1) L. 37. ff. de acq. vel om. her. De Groot. Inleid. 2 B. 32 D. S. 2.

(2) De Groot. Inleid. 2 B. 2 D. S. 12. n. 14. Voet ad tit. ff. de acq. vel om. her. n. 18. V. D. Keessel. Thes. 182.

Of two
kinds.

Inheritance by contract,⁽¹⁾ though admitted with us, particularly in marriage contracts, we shall, with respect to its consequences, class under those by last will.⁽²⁾

Since the right of succession or inheritance is a kind of real right, so it affords a real action.⁽³⁾

This action is given to every one who is entitled to any inheritance or estate, or part thereof, against the possessor, whether he hold as heir, or simply as possessor, that the party suing may be declared heir, and admitted to the inheritance, with all the fruits and profits already enjoyed, or which might have been so.⁽⁴⁾

As the person entitled to a special legacy obtains, by the heir's acceptance of the estate, the right of property in the thing bequeathed, he has, besides the personal action against the heir to deliver it, also a real action for the thing itself.⁽⁵⁾

(1) Successio pactitia.

(2) See above, page 77.

(3) This is known in law by the name of *Petitio Hereditati*.

(4) Voet, aliique D. D. ad tit. ff. de her. pet.

(5) L. 1. 6. Comm. de legat. S. 2. Inst. de legat. De Groot, Inleid. 2 B. 23 D. S. 18.

CHAPTER IX.

Of Succession by Last Will.

SECT. I.

A last will is the direction which any one gives as to the disposal of his property after his death, and which can take effect only when the proper forms are observed. These vary accordingly as the will is an *open* or *sealed* instrument (under a cover).

Kinds of
last will.

An open will is made before a notary and two witnesses, or two members of the court and the secretary.⁽¹⁾ The notary must have been duly admitted as a notary in the place where he makes the act.⁽²⁾ The witnesses must be males, above the age of fourteen years, not incompetent in law, and who take no interest under the will.⁽³⁾

The testator must be known to the notary; or, at least, to the witnesses.⁽⁴⁾

(1) De Groot, Inleid. 2. B. 17. D. S. 17 et 18. Regtsgel Obs. 3 D. Obs. 44.

(2) Regtsgel Observ. 1 D. Obs. 39. and 4 D. pag. 405. Lybregts, Red. Vert. over't Not. ambt. 2 D. Bijl. Litt. B.

(3) De Groot, Inleid. 2 B. 17 D. S. 21. Voet, ad tit. ff. qui test. fac. poss. n. 22.

(4) De Groot, d. l. S. 22. Lybregts, Red. Vert. 1 D. pag. 14-24.

Kinds of
last will.

Although the signature of the testator in presence of the notary and witnesses is required,⁽¹⁾ yet a last will or disposition, verbally and clearly made before the notary and witnesses, must be held good, in case the testator, before the minute or notes should be extended, or drawn out, *should happen to die*, and thus not be able to sign it.⁽²⁾

It must be written on a proper stamp, according to the value of the property or nature of the office held by the testator.*⁽³⁾

A *close will* is written either by the testator, or some person under his direction, provided the person takes no benefit thereby.⁽⁴⁾ It must be written on a proper stamp, and signed by him, and so given to the notary, who, in the presence of two witnesses, puts it in an envelope, and seals it, and makes on the outside the necessary note, which is termed the *act of superscription*.⁽⁵⁾ The party who makes his will in this way must be cautious to keep the seal and envelope unbroken and unopened, otherwise it

(1) Voet, ad tit. ff. qui test. fac. poss. n. 33. Bynkershoek, Quæst. Jur. Priv. Lit. 3. Cap. 5 et 8.

(2) See my Verzameling van Gewijsden, 1 D. Cas. 25.

(3) Ordonn. op't Zegel (or Stamp Act) Van 1794. Art. 51.

(4) Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 8.

(5) De Groot, Inleid. 2. B. 17. D. S. 25. Lybregts, Red. Vert. 1 D. 19 Hoofdst. n. 29 et seqq.

* This ordinance is not in force at Demerara.—T.

loses its force.⁽¹⁾ When such a will is confirmed by the death of the testator, it is opened by the notary, in the presence of witnesses, on the seal and envelope appearing perfect and untouched, and thereof an *act of opening* is made and given out—the original will remaining in the protocol of the notary.⁽²⁾ Besides these two ways of making a will, it is permitted by our law to make it according to the Roman law, *i. e.* verbally, in the presence of *seven witnesses*, though this mode is now nearly fallen into disuse.⁽³⁾

Kinds of
last will.

SECT. II.

Besides the regular wills of which we have spoken, there is also a less perfect sort of will which is termed a *codicil*.⁽⁴⁾ With respect to the form, codicils and wills for the greater part agree.⁽⁵⁾

Codicils.

The substantial difference between them is confined to these two points: 1. By a codicil no direct appointment of the heir can be made, but a will is necessary for such purpose. 2. A testa-

(1) Voet. ad tit. ff. de his. quæ in test. del. n. 1.

(2) Lybregts, Red. Vert. 1 D. 19 Hoofdst. n. 36 et seqq.

(3) Voet, ad tit. ff. qui test. fac. poss. n. 20. V. D. Keessel. Thes. 293.

(4) De Groot, Inleid. 2 B. 25. D. Voet, ad tit. ff. de jur. codicill.

(5) Voet, ad d. l. n. 5.

Codicils.

ment can never be made by a private paper, but a codicil may, when the testator has reserved to himself this power by the will, which is termed the *clausula reservatoria*.⁽¹⁾

SECT. III.

Right of making a last will.

The right of making a last⁽²⁾ will is given to all persons, both male and female, except such as are expressly prohibited by law. Prohibited persons are, 1. Those who, by reason of any mental or bodily infirmity, are deprived of the controul and administration of their property; for example, insane persons and prodigals.—The latter, however, are allowed to make a last will, provided they have previously obtained an *octroi*, or licence, and leave their property to their relations by blood.⁽³⁾ 2. Those persons who have not yet attained the age of puberty, which for males is fourteen, and females twelve years.⁽⁴⁾ 3. Those who are born deaf and dumb, and thus cannot make known their will.⁽⁵⁾ Those who afterwards become so, act most prudently in applying for a licence to make their will.⁽⁶⁾

(1) Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 4 et 5.

(2) Testamenti factio activa.

(3) Voet, ad tit. ff. qui test. fac. poss. n. 34. Regtsgel, Observ. 2 D. Obs. 37.

(4) Regtsgel Observ. 3 D. Obs. 41.

(5) De Groot, Inleid, 2 B. 15 D. S. 6.

(6) Regtsgel, Observ. 2 D. Obs. 38.

4. Those who, on account of their hatred to any particular religion, make their will to the prejudice of those parts of their family who profess it.⁽¹⁾

Right of
making a
last will.

5. Those who have been educated in any charitable institution or hospital, which has the privilege of succeeding to the property of the persons maintained therein.⁽²⁾

For the making of a will by or on the part of children, the consent of the parents is not required, nor by orphans that of their guardians,⁽³⁾ nor with respect to married woman the consent of their husbands;⁽⁴⁾ for married persons, with us, are accustomed to make a joint last will, which is called a *mutual testament*, and which, although contained in one paper, is held as two distinct wills, wherein each⁽⁵⁾ disposes of his or her separate property, and this disposition, therefore, each is at liberty either mutually or separately to revoke.⁽⁶⁾

(1) V. D. Keessel, Thes. 277-279, and my Verz. van Gewijsden, 1 D. Cas. 17.

(2) Resol. Holl. 6 June 1733. G. P. B. 6 D. pag. 491 et 17 Dec. 1766. G. P, B. 9 D. pag. 217.

(3) Voet, ad tit. ff. qui test. fac. poss. n. 43.

(4) De Groot, Inleid. 1 B. 5 D. S. 25.

(5) De Groot, Inleid. 2 B. 17 D. S. 25.

(6) Loenius, Decis. et Observ. Cas. 137, et there Boel. in not.

SECT. IV.

Who may
take under
a will.

The next question is, who may take under a will?⁽¹⁾ To this we answer again, all those who are not expressly prohibited by law. Of this class of prohibitions are, 1st. Bequests to popish priests or religious houses;⁽²⁾ which prohibition is not, however, extended to popish hospitals or charitable institutions.⁽³⁾

2. The devise of real property, or of that which is considered as savouring of the reality by minors to their guardians, curators, or administrators, or their children.⁽⁴⁾

3. Those who have entered into a clandestine marriage, or *eloped* together, may not leave any thing to each other by will.⁽⁵⁾

4. Children born in incest, or adultery, can take no more by the will of the parent, than their necessary maintenance.⁽⁶⁾ With respect to other illegitimate children there is no restriction, except where there are lawful children,

(1) Testamenti factio passiva.

(2) Plac. 4 May 1655. G. P. B. 1 D. pag. 1592.

(3) Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 1. Resol. Holl. 24 Feb. 1729. G. P. B. 6 D. pag. 355.

(4) Placaat van Keizer Karel van 4 Octob. 1540. Art. 12. Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 3.

(5) Plac. 4 Oct. 1540, Art. 17. Plac. Holl. 25 Feb. 1751. G. P. B. 9 D. pag. 535.

(6) De Groot, Inleid. 2 B. 16 D. S. 6 et 27. S. 28.

in which case they can only take a twelfth part.⁽¹⁾

Who may
take under
a will.

5. A man or woman, on second marriage, cannot enjoy more than the least portion which comes to any one of the children by the former marriage.⁽²⁾

SECT. V.

According to the general rule, every person is at liberty to appoint the heir to his property, or to dispose of it by legacies or otherwise, as he thinks proper; subject, however, to some exceptions in favour of children or their descendants, who must be left by the parents, whether as heirs or legatees, at least their *legitimate portion*, which, if the children are four, or less in number, amounts to *one-third*; and, if five or more, to *one-half* among them of the parents' property.⁽³⁾ Parents if heirs at law are also entitled to this legitimate portion;⁽⁴⁾ but the brothers and sisters of the deceased have not this right, unless an infamous person is appointed heir.⁽⁵⁾

Legitimate
portion.

In certain cases, however, for very weighty

(1) V. D. Keessel, Thes. 287.

(2) L. 6. C. de Sec. nupt.

(3) Nov. 18, Cap. 1. Voet, aliiq. D. D. ad tit. ff. de inoff. test.

(4) Voet, ad. d. t. n. 42. Loenius, Dec. et Observ. Cas. 85.

(5) L. 34. L. 36. S. 2. C. de inoff. test.

Legitimate portion. reasons in law,⁽¹⁾ both parents and children may be excluded or cut off from any share in the inheritance; but, in such cases, the will must be made *in judicio*, or before the court, or at least in presence of two commissaries or members of the court as witnesses.⁽²⁾

SECT. VI.

Appointment of heir.

A principal point in all wills is the naming of one or more persons as heir;⁽³⁾ and the words to this effect are not important, provided the intention of the testator clearly appears.⁽⁴⁾ Nor is the description material;⁽⁵⁾ ⁽⁶⁾ nor is it important in what part of the will⁽⁷⁾ he is named, nor for what time;⁽⁸⁾ nor, if there be more heirs than one, whether they are appointed heirs for equal or unequal portions, or with or without condition or reservation.⁽⁹⁾ With respect, however, to *conditions*, we should observe that those

(1) Nov. 115. Cap. 3 et 4. De Groot, Inleid. 2 B. 18 D. S. 13 et 16.

(2) Erd. der Notar. Art. 4.

(3) T. t. ff. de her. inst.

(4) L. 62. S. 1. ff. d. t.

(5) L. 1. S. 5, 6, et 7. L. 48. pr. ff. d. t. L. 7. C. de testam.

(6) L. 34. ff. de cond. et dem.

(7) S. 34. Inst. de legat.

(8) De Groot, Inleid. 2 B. 18 D. S. 21.

(9) T. t. ff. de cond. inst. t. t. ff. de cond. et. dem.

have relation to a cause or thing not yet *in esse*.⁽¹⁾ Appointment of heir.

That they must be possible, since impossible conditions are held to be void in law, and as if they had not been inserted in the will.⁽²⁾

That they are not *contrà bonos mores*,⁽³⁾ or of a nature to be irreconcilable with, or overturn or defeat the will of the testator;⁽⁴⁾ a condition that the heir should refrain from doing a particular act, is lawful, and the heir is bound in this case to give security that he will not do it.⁽⁵⁾

When several persons are all appointed *joint* heirs, and one or more of these happen to die before the testator, their share goes to the survivor, unless each of the heirs has only a separate portion of the inheritance; this is termed the *Jus Accrescendi*.⁽⁶⁾

SECT. VII.

As it is very possible that the person named as heir may, by dying before the testator, or for some other cause, not be heir at the death of the Substitution.

(1) L. 10. S. 1. L. 11. L. 68. ff. de cond. et dem. L. 45. S. 2. ff. de leg. 2.

(2) L. 3. ff. de cond. et dem. L. 1. ff. de cond. inst. Voet, ad tit. ff. de cond. inst. n. 16.

(3) L. 14. ff. de cond. inst.

(4) L. 16. ff. de cond. inst.

(5) L. 7. pr. ff. de cond. et dem.

(6) V. D. Keessel, Thes. 326.

Substitu-
tion.

testator, it is prudent in such case to provide for it by naming one or more others in case of such failure.⁽¹⁾

This is termed *Substitution*.

With the Romans, besides the common substitution (*substitutio vulgaris*), there were two other kinds :

1. The *Pupillaire*, or *Substitutio Pupillaris*, whereby the father appointed the heirs of his child in case he should happen to die under the age of puberty.⁽²⁾ But this is not admitted with us,⁽³⁾ although the power whereby parents may make a special disposition, *i. e.* whether they shall go by the law of one particular province or another, as to the succession of their children's property, seems to resemble it in some degree.⁽⁴⁾

2. The *Quasi Pupillaire*, or *Exemplaire Substitutie*, whereby parents may dispose of the property of their children, who are not *compos mentis*, provided they die in that state.⁽⁵⁾ But to render this act valid with us, a decree of the court is necessary.⁽⁶⁾

(1) T. t. ff. de vulg. et pup. subst.

(2) L. 2. pr. ff. d. t.

(3) De Groot, Inleid. 1 B. 6 D. S. 3. et 2 B. 19 D. S. 9.

(4) De Groot, Inleid. 2 B. 29 D.

(5) S. 1. Inst. de pup. subst. L. 9. C. de impub. et al subst.

(6) Regtsgel, Observ. 1 D. Obs. 41.

SECT. VIII.

Sometimes also a person is appointed heir, under the condition that the property after his death shall pass to another;⁽¹⁾ this is termed a *fidei commissum*. With this charge or condition the testator may affect all those who take any benefit under his will, except his children, in so far as their⁽²⁾ legitimate portion is concerned:⁽³⁾ this must always remain free, and only that portion which exceeds it can be burthened with a *fidei commissum*. However, it has now been introduced into practice, that a father may put his child to the election to declare, and frequently under a judicial act, whether he will accept this legitimate portion free and unincumbered, leaving the residue to a third person, or will renounce it, and in its place take a child's portion of the whole inheritance burthened with a *fidei commissum*.⁽⁴⁾

*Fidei Com-
missum.*

(1) Tit. Inst. de fideic. hered. t. t. ff. ad SCt. Trebell. Thevenot, Traité des Substitutions Fidei-Commissaires. Paris 1778, in 4to.

(2) L. 1. S. 6. ff. de legat. 3.

(3) L. 28. ff. de legat. 2. L. 32. C. de inoff. testam. Nov. 39. Cap. 1.

(4) This practice certainly but badly answers the purpose of the law, to leave the legitimate portion free and unincumbered to the children, and it is an indirect mode of effecting what cannot be done in a direct manner.—Schotani, Exam. Jurid. ad tit. ff. de inoff. test. quæst. 27. It is, however, so generally re-

*Fidei Com-
missum.*

There are no peculiar words necessary to the creation of a *fidei commissum*,⁽¹⁾ provided the person to whom the property is to go over is clear. The mere prohibition of alienation, without saying in whose behalf it is prohibited, is of no effect;⁽²⁾ but it is otherwise when the prohibition is to alienate out of the family.⁽³⁾ *Fidei commissaire substitutions*, or *trusts*, are of different kinds; 1st. A pure *fidei commissum* under no condition;⁽⁴⁾ 2ndly. A conditional trust or *fidei commissum* which only takes effect in a particular case, for example in case the heir dies without issue.⁽⁵⁾ This condition is implied, when any one in the ascending line, burthens any of his descendants with a universal *fidei commissum*;⁽⁶⁾ 3dly. A *fidei commissum* in succession, when the substituted heirs are in like manner affected with a trust, or limitation, over to third persons;⁽⁷⁾ 4th. A trust may be of the whole inheritance,

ceived, and has been so often confirmed by condemnations of the Court of Justice, that the validity thereof is not to be doubted.—See further Lybregts, Red. Vert. 1 D. 28 Hoofdst. n. 6.

(1) L. 2. C. Comm. de legat.

(2) This is generally called a nudum præceptum. L. 114. S. 14. ff. de legat. 1. L. 38. S. 4. ff. de legat. 3.

(3) L. 69. S. 3. ff. de legat. 2.

(4) L. 41. S. 14. ff. de legat. 3.

(5) L. 114. S. 13. ff. de legat. 1.

(6) L. 202. ff. de cond. et dem. L. 30. C. de fideic.

(7) L. 1. S. 7. L. 41. S. 14. ff. de legat. 3.

or of a part of some special property ;⁽¹⁾ 5th. *Fidei Com-*
 A reciprocal trust, when two persons are each *missum.*
 mutually affected with a trust for the other ;⁽²⁾
 6th. A trust of the residue, as when the heir is
 charged, in case he die without issue, to suffer
 the residue of the property at his death, to pass
 to a third person.⁽³⁾ In this case, he must at least
 suffer a fourth part of the original property to
 pass.⁽⁴⁾

The person to whom the limitation over of
 the enjoyment of any thing is made, must wait
 till the event take place on which such limita-
 tion is to take effect ; as for example, the death
 of the heir under the will.⁽⁵⁾ He must, however,
 be at this time in a capacity or state to take as
 substituted heir ;⁽⁶⁾ and this limitation in his
 favour is not such a vested interest in him, as
 to pass to his heirs, when he himself is not enti-
 tled at the time of the event ; as, for example, if
 he die before the heir under the will.⁽⁷⁾

(1) T. Inst. de sing. ret. per. fideic. rel.

(2) L. 77. S. 13. ff. de legat. 2. L. 16. C. de pact. L. 11.
 C. de transact.

(3) L. 70. S. 3. ff. de legat. 2. L. 54. L. 58. S. 8. ff. ad
 Sct. Trebell. This is called a *Fidei Commissum Residui*.

(4) Nov. 108. Cap. 1. De Groot, Inleid. 2 B. 20 D. S. 13.

(5) L. un. S. 7. C. de caduc. toll.

(6) L. 52. ff. de legat. 2.

(7) L. 3. L. 5. ff. quand dies legat. ced. L. 17. ff. de
 legat. 2. L. 54. ff. de Reg. Jur.

*Fidei Com-
missum.*

An heir thus affected with a trust, has a real though burthened right of property;⁽¹⁾ and thus differs from him, who has a mere usufruct in the subject, of which the naked right of property is in the meantime left to another, who may leave it to his heirs, although he die before the *usufructarius*.⁽²⁾ In the meantime it is also incident to a trust, that the heir, so long as the trust cannot be executed, enjoys the fruits of the property;⁽³⁾ and that he retains the whole under his disposition, except when the testator has appointed a special administrator.⁽⁴⁾

That he must exercise his power over the property, as a good father of a family,⁽⁵⁾ and preserve the trust property in a proper state,⁽⁶⁾ and make a proper inventory thereof;⁽⁷⁾ and lastly, that he give security to the party in expectancy for the delivery of the property, when his possession and title expires.⁽⁸⁾

The person, however, who is in the enjoyment of property thus burthened, has no right to incumber or alienate it at his pleasure, but only

(1) L. 54. ff. de acq. vel. om. hered.

(2) Voet, ad tit. ff. de usufr. n. 13.

(3) L. 83. ff. de leg. 3. L. 57. ff. ad Sct. Trebell.

(4) Lybregts, Red. Vert. 1 D. 30 Hoofdst. n. 4.

(5) L. 22. S. 3. ff. ad Sct. Trebell.

(6) L. 7. S. 2. ff. de usufr.

(7) Nov. 1. Cap. 2. S. 2.

(8) T. t. ff. ut leg. vel fid. Serv. caus. cav.

for the payment of⁽¹⁾ debts, which are a charge upon the property itself;⁽²⁾ or with the consent of all the parties in expectancy,⁽³⁾ or for purposes of absolute necessity.⁽⁴⁾ In which latter case, however, a previous decree of the court is necessary. ✓

*Fidei Com-
missum.*

When the event takes place on which the property is to be given over, the heir must suffer it to pass to the person to whom it is limited;⁽⁵⁾ saving however to the heir his right at law to deduct and retain a fourth part, which is termed the *Trebellian portion*;⁽⁶⁾ this legal right is, however, in most cases, expressly barred by the will;⁽⁷⁾ a double deduction, *i. e.* a deduction of the legitimate, as well as of the *Trebellian portion*, is, however, by the canon law, permitted to children who are burthened with a universal trust.⁽⁸⁾ The *fidei commissum*, or trust, ends, 1st. By failure of the condition upon which it is made;⁽⁹⁾

(1) L. 3. S. 2, 3, et 4. C. Comm. de legat.

(2) L. 1. S. ff. ad. Sct. Trebell. L. 78. S. 4. ff. de legat. 2 L. 15 c. de legat.

(3) L. 12. S. 1. ff. de legat. 1 L. 11. C. de fideic.

(4) Nov. 39. Cap. 1.

(5) L. 27. S. 11. ff. ad Sct. Trebell.

(6) De Groot, Inleid. 2 B. 20 D. S. 6.

(7) Auth. Sed cum. C. ad Leg. Falc.

(8) Cap. Raynutius X. de testam.—De Groot, Inleid. 2 B. 20 D. S. 10. Vinnius, Sel. Quæst. Lib. 2 Cap. 29.

(9) L. 49. S. 1, 2, and 3. ff. de legat. 1 L. 21 ff. quand. dies leg. vel fid. L. 12. S. 2. ff. fam. ercisc.

*Fidei Com-
missum.*

2nd. When the person in expectancy dies before the heir,⁽¹⁾ or becomes incapable or disqualified to take;⁽²⁾ 3d. By the perishing of the trust property, without fault of the heir;⁽³⁾ 4th. By the express renunciation of the party in expectancy;⁽⁴⁾ 5th. In case the heir thus charged with a trust dies before the testator, and thus the appointment of heir itself fails;⁽⁵⁾ 6th. By a release from the trust, which can only be obtained from the sovereign, and only for lawful reasons, and on the consent of all the parties in expectancy.⁽⁶⁾

SECT. IX.

Legacies.

Among the special modes of disposing of property by will, legacies deserve the first place.⁽⁷⁾

Those who may make a will have also the power of bequeathing by legacy, and all persons capable of taking by will may also take as legatees.

Legacies, however, are void, 1st. When it is

(1) L. 17. L. 60. ff. de legat. 2 L. 4 ff. quand. dies legat.

(2) L. 10 S. 1. ff. de his. quæ ut indign.

(3) L. 26. S. 1. ff. de legat. 1 L. 22. S. 3. ff. ad Sct. Trebell.

(4) L. 26. C. de fideic. L. 34. S. 2. ff. de legat. 2.

(5) L. 81. ff. de legat. 2. L. 23. ff. de legat. 3.

(6) Plac. 23 July 1670. G. P. B. 3 D. pag. 491.—See also my *Verhandel over de Judic. Pract.* 2 D. 4 B. 7 Hoofdst. S. 9.

(7) T. Inst. de legat. t. t. ff. de legat et fideic. Lib. 30, 31, et 32 Digest. Pothier, *Verhand. Van Legaten*, which I translated and published.

impossible to collect in whose behalf they are made;⁽¹⁾ but if the intention of the testator can be made clearly to appear, an error in the name or description of the legatee is not fatal.⁽²⁾ Again, when we cannot discover *what* thing the testator meant to leave.⁽³⁾ In this case, also, error in the name or description of the *thing* is of no consequence, provided the intention of the testator can be clearly discovered;⁽⁴⁾ neither will an error in the motives assigned for the legacy, affect it.⁽⁵⁾

A testator may charge his heirs with the giving of any particular thing, or doing any particular act, and on non-performance of the condition, may charge him with a legacy to a third person, provided this condition be not contrary to law, or *contra bonos mores*.⁽⁶⁾ Legacies, however, given for the purpose of scandalizing any one,⁽⁷⁾ are not good; nor those made through pure caprice,⁽⁸⁾ or palpably tending

(1) L. 10. ff. de reb. dub.

(2) L. 33, L. 34. ff. de cond. et dem. L. 48. S. 3. L. 58. S. 1. ff. de her. inst.

(3) L. 73. S. 2. ff. de Reg. Jur.

(4) L. 7. S. 1. C. de legat. L. 75. S. 1. ff. de legat. 1. L. 1. S. 8. ff. de dote præleg.

(5) L. 17. S. 2. L. 72. S. 6. ff. de cond. et dem.

(6) L. un. C. de his. quæ poen. caus. Voet, ad eund. tit. ff. n. 3.

(7) L. 54. ff. de legat. 2. L. 48. S. 1. ff. de her. inst.

(8) Pothier, Verh. Van Legaten, 1 Hoofdst. S. 9.

Legacies. to reward vice ;⁽¹⁾ nor made with the object to entice others to grant legacies to us ; nor legacies which are obtained from the testator by deceit and misrepresentation ;⁽²⁾ nor those which are made to depend entirely on the will of the heir.⁽³⁾

All those who take any benefit under the will, whether as heirs or legatees, may be burthened with the duty of paying a legacy to others⁽⁴⁾

The testator may leave by legacy, not only his own goods, but also those of his heirs or third persons ; and in the latter case, the heir who is burthened with such a legacy is bound to purchase the thing so left from the owner, and to give it over to the legatee, or, at least, the value, if the owner be not disposed to part with it.⁽⁵⁾ In case the thing so left is already the full and absolute property of the legatee, the legacy is void,⁽⁶⁾ unless the legatee has obtained it by purchase or the like, in which case the heir is bound to reimburse him the price which he has paid.⁽⁷⁾ Legacies of things *non in*

(1) Pothier, *ibid.* S. 10.

(2) L. 64. ff. de legat. 1. L. 70, 71. ff. de her. inst.

(3) L. 11. S. 7. ff. de legat. 3.

(4) L. 1. S. 6. ff. de legat. 3.

(5) S. 4. Inst. de legat. I. 14. S. ult. ff. de Legat. 3.

(6) S. 10. Inst. de legat.

(7) L. 34. S. 7. ff. de legat. 1.

commercio, and which cannot be sold or alienated, Legacies. are void.⁽¹⁾

In the interpretation of bequests, we must not depart from the *proper signification of the words* of the will, unless there are good reasons to believe that the testator had understood them in another sense ;⁽²⁾ for example, when the disposition in his will would otherwise amount to a contradiction,⁽³⁾ or could not be supported,⁽⁴⁾ the words at all times must be so interpreted that the disposition in the will may stand.⁽⁵⁾ In cases of doubt with regard to the sum, *the least* must be taken as meant.⁽⁶⁾

A general legacy of goods out of a certain class or description, comprehends also such things which are not entirely of this nature, but wherein some other matter, by way of addition, is contained ; for example, under a legacy of the tortoise-shell boxes possessed by the testator, are comprehended also those of tortoise-shell with gold or silver setting or mounting.⁽⁷⁾

When a testator follows a general bequest of any kind of thing, with the *enumeration* of the

(1) L. 39. S. 8, 9, et 10. ff. de legat. 1.

(2) L. 96. ff. de Legat. 3.

(3) L. 15. ff. de anr. et arg. leg.

(4) L. 50. S. 5. ff. de legat. 3.

(5) L. 109. ff. de legat. 1.

(6) L. 9. ff. de Reg. Jur. L. 43. S. 1. ff. de legat. 2. L. 14. S. 1. ff. de legat. 1.

(7) L. 100. S. ult. ff. de legat. 3.

Legacies. special sorts, the legacy is not confined to the special *enumeration* unless another object of this limitation clearly appears.⁽¹⁾ Under general legacies are not comprehended those things which, although comprised under the principal head, have been already specifically bequeathed to another.⁽²⁾ When the testator has made two contrary dispositions by his will, and in each of these seems equally to persevere, or when no distinction can be made in respect to which he perseveres in, and in which he has changed his intention, the one disposition annuls the other, and neither can take effect.⁽³⁾ A bequest of a parcel of land with all its appurtenances, or all that belongs to it, carries with it the implements of husbandry serving to the culture of the land.⁽⁴⁾

The bequest of a farm or landed estate, *thoroughly furnished*, comprehends not only all that is necessary to the cultivation of the land, but also the household furniture and all that is necessary to render the house habitable.⁽⁵⁾ Under legacies of things at or to be found in a certain place, is comprehended all things which, from their nature and use, are usually kept and in-

(1) L. 9. ff. de Suppell. leg.

(2) L. 80. ff. de Reg. Jur. L. 22. S. ff. de pecul. leg.

(3) L. 88. ff. de Reg. Jur.

(4) T. t. ff. de instr. vel instr. leg.

(5) L. 12. S. 27 et 28. ff. de instr. vel instr. leg.

tended to remain there, and not what is accidentally found there.⁽¹⁾ Legacies.

A legacy of *plate* comprehends all the table service, as dishes, plates, spoons, forks, knives, bowls, salt cellars, candlesticks, chafing dishes, &c.; but no other plate, such as silver chandelier branches, images, &c., pass under such a bequest.⁽²⁾ Under the head of *clothes* is comprised all articles which are used for this purpose, both for head and feet, but not that which pertains only to ornament.⁽³⁾ In a bequest of *household furniture* is included all that is necessary for the usual furnishing of a house, but not *plate*, or costly articles serving merely for ornament.⁽⁴⁾

There are also legacies to be paid *yearly*, *monthly*, or *weekly*, which have this peculiarity, that a legacy of this nature, as a yearly one, for example, is due from the first day of the year, and therefore if the legatee die within this time, it goes to his heirs.⁽⁵⁾ From the moment of the testator's death, the legatee acquires a vested right in the legacy;⁽⁶⁾ in so far as it is not sub-

(1) L. 78. S. 7. ff. de legat. 3.

(2) L. 19. S. 8. ff. de aur. et arg. leg.

(3) L. 19. seqq. ff. de aur. et arg. leg.

(4) T. t. ff. de suppell. leg.

(5) L. 4. ff. de ann. legat. L. 12. S. 1. ff. quand. dies legat. De Groot, Inleid. 2 B. 23 D. S. 14.

(6) L. 5. pr. et S. 1. ff. quand. dies legat. L. un. S. 5. C. de caduc. toll.

Legacies. ject to any condition, in which case it only vests from the day the condition is fulfilled;⁽¹⁾ the addition of a certain limited time has this consequence, that although the right to the legacy is vested by the death of the testator, the right to demand the legacy does not arise until the time arrives.⁽²⁾ When it is uncertain whether the time mentioned may ever arrive, or when it may come, it is held as a condition (precedent),⁽³⁾ except in cases in which this limitation of time is not annexed to the legacy itself, but only to the time of payment; in which last case, if the legatee dies after the testator, but before the legacy itself is payable, the right nevertheless is vested and passes to his heirs.⁽⁴⁾

The legatee has three distinct actions, for his legacy.

1st. A personal action under the will,⁽⁵⁾ against the heir, or such other person as is charged with the payment of the legacy; or against the executor, for the delivery of the thing with such increase, or decrease as it may have suffered;

(1) L. 5. S. 2. ff. quand. dies legat. L. 104. S. 1. ff. de legat. 1.

(2) This is entitled *in law*, *Dies cedit, sed nondum venit*. L. 5. S. 1. L. 21. ff. quand. dies legat.

(3) D. L. 21.

(4) L. 26. S. 1. ff. eod. J. Averanius, *Interpr. Jur. Lib. 2. Cap. 16. et Lib. 4. Cap. 5.*

(5) S. 5. *Inst. de oblig. quæ quasi ex contr.*

provided the latter has not been caused by the *Legacies*. fault of the heir.⁽¹⁾

2d. An action *in rem*, to recover the thing itself, against any possessor whatsoever.⁽²⁾

3d. An hypothecary action on the ground of the tacit, or implied mortgage which the law gives to legatees, in this respect, in all the property which comes to the heir from the testator.⁽³⁾

With the Romans, it was lawful for the heir to deduct his *Falcidian portion*, i. e. a fourth part of the property, when more than three fourths was willed away from him in legacies;⁽⁴⁾ but by our law this deduction is not permitted, except in the case when the heir enters upon the inheritance under the benefit of inventory.⁽⁵⁾

SECT. X.

In order to render the execution of one's last *Executors*. will more certain, it is very much the custom to charge one or more persons with this trust, under the name of *executors*, to which office all

(1) L. 16. ff. de legat. 3. L. 24. S. 2, 8, et 4. ff. de legat. 1. L. 10. L. 39. ff. de legat. 2.

(2) L. 64. ff. de furt. S. 2. Inst. de legat.

(3) L. 1. C. comm. de legat.

(4) T. t. Inst. et ff. ad Leg. Falc. J. Voorda, Comment. ad Leg. Falc. (Harl. 1730.)

(5) Sande, Decis, Fris. Lib. 4. tit. 12. def. 1. Voet, ad tit. ff. de jur. delib. n. 22. et 27.

Executors. persons are eligible, who may by law undertake the administration of other persons' affairs, even females,⁽¹⁾ though these are otherwise incapable of becoming guardians.⁽²⁾ These executors are appointed by testament, codicil, or other special act;⁽³⁾ and they are at liberty to decline the office, wherein they differ from guardians. Their office consists in the sealing up of the effects of the deceased at his house; in providing for his funeral; in the taking a proper inventory; and in liquidating the estate, by collecting in the outstanding debts, and selling the goods; and further in carrying into effect the last will of the testator, as well by paying the legacies, as following the other directions of his will; in making out a clear account and statement, and giving over the clear surplus or residue of the estate to the heir, or those who are entitled to take charge of it, who are termed administrators.⁽⁴⁾ As a recompence for their trouble they are entitled to the 40th penny on receipts, and the 80th on disbursements, and one per cent. on ready money, found in possession of the testator, and on monies received from rents, annuities, mortgages, and the like redeemed; and with respect to journies, &c., necessary for bringing

(1) L. 15. pr. ff. de alim. et cibar. legat.

(2) See above, page 98.

(3) Ordonn. op't Zegel van 1794. Art. 53.

(4) Lybregts, Red. Vert. over't Not. Ambt. 1 D. 30 Hoofdst.

the estate to liquidation, to their reasonable charges and expenses.⁽¹⁾ Executors.

With us the inheritance does not descend on the heir, but there must be an act on his part, done in his character as heir, which is termed the committing an *acte hereditaire*,⁽²⁾ since every person appointed as heir under a will, is at liberty to accept or repudiate the inheritance.* Acceptance or repudiation of an inheritance.

When however the party named as heir, dies before such act, or even before notice of the succession, this right passes to his heirs.⁽³⁾

(1) Lybregta, d. l. n. 61. et 2 D. Bijl. Z. where a remarkable sentence of the Supreme Court, of 28 July 1725, is to be found.

(2) T. t. ff. de acq. vel om. her.

(3) Loenius, Decis. et Observ. Cas. 56.

* Quære, as to the case of an English bankrupt succeeding to an inheritance in one of the ceded Dutch colonies, whether he could be compelled to accept the inheritance for the benefit of his Creditors? The difficulties which prevailed, with respect to the execution of a power by a bankrupt for the benefit of his creditors, previously to the passing of the act on that subject of 5. George IV. chap. 98. S. 75., seem to be stronger in this case than in that. At all events, such bankrupt heir ought to be saved harmless by the assignees.

A case, the same in principle, occurred in Friesland, as reported in Sands's *Decisiones Frisicæ*, when a bankrupt, who was entitled to an inheritance, but by the Civil and Dutch law had had the right of repudiating, renounced in favour of his children. It was held that this was a fraud upon his creditors, and that the right had passed to them.—T.

(See the printed Judgment of the Court of Demerara in the case of Odwin v. Forbes, referred to supra, p. 60.)

Accept-
ance or re-
pudiation
of an in-
heritance.

Since the heir by accepting the inheritance cannot afterwards repudiate,⁽¹⁾ and becomes tacitly bound in law by this act, for the payment of all the debts and charges on the estate, though they may exceed the value;⁽²⁾ the law has, for the protection of the heir, provided two means :

Act of de-
liberation.

1st. The permission, before he determines to accept or repudiate, to take out a judicial act, termed an *Act of Deliberation*, or of *Non Prejudice*.⁽³⁾

The effect of which is only to prevent any necessary acts done by him, to ascertain the solvency of the estate from being construed as an *Acte Hereditaire, or of Acceptance*, unless the acts were of such a nature as to alter or confound the property of the testator, and destroy it entirely, as for example, the making of payments after passing this act. Further, the operation of this act continues no longer than the creditors are content to wait, since they have in fact the right to compel the heir to accept, or repudiate the inheritance.

† (1) L. 4. C. de repud. vel abst. hered.

(2) Voet, ad tit. ff. de acq. vel om. her. n. 18 et 19.

(3) Lybregts, Red. Vert. over't Not. Ambt. 2 D. 7 Hoofdst., who, however, in common with many other writers, confounds the practically known (with us) Act of Deliberation with the Jus Deliberandi of the Romans; though the latter, in its nature and consequences, differs considerably from the former, and is on that account not in use with us.

2d. After the act of deliberation, and the consequent enquiry into the solvency of the estate ; if there should still remain any uncertainty, then the heir may apply to the Court of Holland,^{(1)*} for the writ of Benefit of Inventory,⁽²⁾ whereby he is at liberty to enter upon an

Benefit of
Inventory.

(1) This court is now applied to in this respect instead of the Supreme Court, as formerly. Instr. H. R. Art. 23. Public. 30 Sept. 1795, No. 2. Art. 3.

(2) Since the expenses incurred on this Writ of Benefit of Inventory are often very high, from the exorbitant charges permitted to be made by the Marshals, a practice has been introduced in Amsterdam, of petitioning the court that the appointment of executors may be converted into a Commission of Curatorship, which has the same effect as that of Benefit of Inventory, when confirmed.

This is certainly an ingenious invention ; but whether it be consonant to the principles of our law to appoint a Curator over an estate before it is repudiated by the heir, seems to me very questionable.

* The Supreme Court was rather a court of appeal and cassation, with original jurisdiction in certain privileged cases ; whereas the court of Holland exercised nearly all the functions of the court of King's Bench in England, and was the High or Provincial Court of the two Provinces of Holland and Zealand. In each of the other provinces there was also a High and Provincial Court, as contradistinguished from the town and inferior tribunals.

Therefore, whenever the term Court is used by itself in this translation, the Court of Holland, or one of these superior Provincial Courts, according to the subject, must be understood.

For the enumeration of the various powers of the Court of Holland, see *infra*.—T.

Benefit of
Inventory.

uncertain estate, and make an inventory thereof, without being liable to the creditors and legatees, beyond the real value of the property found therein.⁽¹⁾

With respect to this Benefit of Inventory, we must observe :

1st. That hospitals and poor houses,⁽²⁾ governors of orphan houses, deacons, almoners,⁽³⁾ and orphan chambers,⁽⁴⁾ have without this writ the privilege of not being responsible beyond the value of the estate.

2d. That this writ is issued with *Committimus* to the judge of the city, or town, where the defunct last lived,⁽⁵⁾ and if it should happen to have been in the country, then to the judge of the next town,⁽⁶⁾ to which judge is committed the confirming (*Interinement*) of the writ, and making it absolute.⁽⁷⁾ 3rd. That when the defunct has died on his voyage to the East or West India Settlements, the *Committimus* is directed to the judge of the place, where the

(1) De Groot, Inleid. 2 B. 21 D. S. 8-12. Lybregts, Red. Vert. 2 D. 8 Hoofdst. D. D. ad. tit. ff. de jur. delib.

(2) Resol. Holl. 20 Decemb. 1635.

(3) Resol. Holl. 7 March 1680.

(4) Resol. Holl. 4 Decemb. 1751.

(5) Ampl. Instr. van den Hove. Art. 5. Resol. Holl. 10 July 1677.

(6) Ampl. Instr. d. Art. 5. Papeg. 1 D. pag. 214.

(7) See our Verhand over de Judic. Pract. 2 B. 30 Hoofdst. S. 4.

board is established, under whose commission he embarked.⁽¹⁾ 4th. That when the heir has suffered more than six weeks to expire after the decease, without applying for the writ, it is usual to insert a clause in the petition for *Relief*, against the lapse of time, so far as is necessary.⁽²⁾

Benefit of
Inventory.

5th. That when this writ is granted, the marshal gives notice to the creditors and legatees, to appear at the house of the deceased, to see an inventory of the goods made, which must be done by the marshal within forty days after issuing the writ,⁽³⁾ as also to appear before the court to consent to or oppose its *Interinement* or confirmation.

The heir, when the goods are inventorized, must cause the same to be appraised, and give security for the amount. He must, moreover, liquidate the estate, and render an account.

6th. That this *Interinement* may be opposed, on two grounds, either that the heir has already committed an hereditary act, or that he has been guilty of bad faith in the making of the inventory or statement of the value and amount of the property of the deceased.

Lastly, it is to be observed, that all those

Succession
of Colla-
terals.

(1) Resol. Holl. 22 December 1735.

(2) Van Alphen, Papeg. 1 D. pag. 215..n. 13. De Haas. Aanteek. op. Merula, Lib. 4. Tit. 24. Cap. 12. S. 13. (o).

(3) Placaat van Keizer Karel van 19 May 1544, Art. 39.

Succession
of Colla-
terals.

who inherit any immoveable property from their relations, either in the ascending or collateral line, must pay thereon the duty on *Collateral Successions*, which amounts to ten per cent. when the party who succeeds to the property would not have been *Heir ab Intestato*, or is related to the testator beyond the fourth degree. Six and two-thirds per cent. are paid in the case of a man and wife (who leave no children of the marriage) succeeding to each other, and five per cent. is paid when parents succeed to the property of their children, or when heirs at law succeed to the property of their relations within the fourth degree, when they die intestate; on all which duties an additional ten per cent. is also to be paid.⁽¹⁾

SECT. XI.

How a last
will be-
comes
void.

The causes by which a last will, originally good, becomes void, are the following:

1st. By express *revocation*, by a subsequent will, or by an act attested by the same number of witnesses as is requisite to attest a will, whereby the party declares his intention to die *Intestatus*.⁽²⁾ In case the will contains the *Clau-*

(1) Ordonn. op't Collateraal van 1 May 1723. Publ. Holl. 22 Decemb. 1733, et 29 June 1743; also a number of resolutions for the decision of casual cases, in the 6th and following volumes of the Gr. Plac. Boek.

(2) De Groot, Inleid. 2 B. 24 D. S. 16. Voet, ad tit. ff. de inj. rupt. irr. n. 1.

sule derogatoire, i. e. a declaration, that no subsequent testament shall be good, unless certain words (used in the first will,) are therein found repeated; as for example, *Heaven be my Inheritance*, such subsequent will is nevertheless good, whether these words are expressly repeated, or whether it *be made* by a simple and entire revocation of the former will, although such former will contain a *Clausule derogatoire*.⁽¹⁾ 2d. The making of a second perfect will, which although it contain no express revocation of the former will, is nevertheless a revocation thereof *de facto*, unless the intention of the testator appears to have been, that the former will should remain good wholly, or in part.⁽²⁾

How a last will becomes void.

3rd. The breaking of the seals, and threads, and envelope of a close will is held as a revocation.⁽³⁾ In an open will, however, erasures and alterations made by the testator, in the *Grosse* or notarial copy, are not sufficient to cancel it, when he suffers the original minute of it to remain entire and untouched.⁽⁴⁾

(1) Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 6 et 7. et Lib. 2. Cap. 16. n. 6.

(2) De Groot, Inleid. 2 B. 24 D. S. 9. Voet, at tit. ff. de inj. rupt. n. 8. V. D. Keessel, Thes. 329.

(3) Holl. Com. 6 D. 2. St. Cons. 13-16. Stockmans, Decis. 13.

(4) V. D. Keessel, Thes. 330. See also my Verzan van Gewijsden, 1 D. Cas. 13.

How a last
will be-
comes
void.

4th. When the persons named by the testator as heirs, happen to die before him, or refuse, or cannot become heirs;⁽¹⁾ in which case, however, the legacies must be paid, especially when the testament contains the clause, that if it cannot take effect as a will, it shall at least be good as a codicil, which is termed, *The Clause Codicillair*.⁽²⁾

And 5th. When an unmarried person makes a will, and afterwards marries, and has children by the marriage, their birth amounts to a revocation of the will.⁽³⁾

(1) L. 181. ff. de Reg. Jur.

(2) Voet, ad tit. ff. de inj. rupt. n. 14.

(3) Voet, ad tit. ff. de inoff. test. et ad tit. ff. de lib. et posth.
V. D. Keessel, Thes. 306.

CHAPTER X.

SECT. I.

Of Inheritance ab Intestato.

THE inheritance *ab Intestato*, (which takes place when the deceased has either made no will, or his will, for some of the reasons above mentioned,⁽¹⁾ becomes void⁽²⁾) has been from old times in Holland of two kinds, either according to the *Aasdomsch*, or, according to the *Schependomsch Recht*. The rule of the first, is *the next of blood inherits the goods*, of the second, *the goods must revert to the source from whence they came*.⁽³⁾ From these two laws, the States of Holland, in the year 1580,⁽⁴⁾ framed a law of inheritance *ab Intestato*, under the title of the *New Schependomsch* or *South Holland right of Inheritance ab Intestato*; but those who inhabited the Northern quarters, being accustomed to the *Aasdomsch Recht*, and not being reconciled to this new law, in the year 1599,⁽⁵⁾ a new law was made,

Inherit-
ance *ab*
Intestato.

(1) IX. Chapt. S. 11.

(2) L. 64. ff. de verb. sign.

(3) De Groot, Inleid. 2 B. 28 D. S. 1. et seqq. H. V. D. Vorm, Versterfrecht. 7 et 9. vol.

(4) Pol. Ord. of 1 April 1580, Art. 19-28.

(5) Plac. Holl. op de Successie ab intestato of 18 Decemb. 1599.

Inherit-
ance *ab*
Intestato.

whereby the succession *ab Intestato*, was regulated for the following towns, *Haarlem, Leyden, Amsterdam, Alkmaar, Hoorn, Enkhuizen, Edam, Woerden, Naarden, Monnikendam, Medenblik, Muiden*, and *Purmerend*, also for the other towns, seignories, islands, villages, and hamlets, under the jurisdiction of the *Dykes of Rhyland*, for the district of *Woerden*, and to the East and North of *Rhynland*, and the land of *Woerden*, also in *Holland*, and *West Friesland*, except *Waddingsveen, Boskoop, Reewijk, Sluipwijk, Bloemendaal*, and *Middelburg*, with their dependencies, both on the East and West side of the *Jouwe*.

This law is termed the *New Aasdomsch*, or *The North Holland and West Friesland Law of Succession ab Intestato*.*

SECT. II.

Laws of
South and
North
Holland
as to
Intestacy.

We must now endeavour to explain, shortly, the chief heads of both these laws of inheritance, *ab intestato*, with their differences, and to reduce them to some rule.

1st. Children, grand children, and remoter descendants, are preferent to all others, in the estate of the parents; all the children take equally *per capita*, but the children of a deceased

* This law is also in force in Demerara.—T.

brother or sister, take *per stirpes*, or by representation.⁽¹⁾

2d. The children and remoter descendants failing, the inheritance of the deceased goes to his father and mother, in case they are both alive.⁽²⁾

3d. But if only one of the parents be alive, whether father or mother, which we term *the separation of the bed*, then by the law of South Holland, all the goods of the deceased go to the brothers and sisters,⁽³⁾ whether of the whole or half blood,⁽⁴⁾ in equal shares, and their children, and grand children, *per stirpes*, provided the half brothers and sisters, and their descendants are related to the deceased on the side of the deceased parent; since in South Holland, when the *bed is thus separated*, the surviving father or mother, and all the collateral relations, which are of kin to the deceased through the surviving father or mother, are excluded.⁽⁵⁾ But according to the North Holland law, the surviving parent divides with the brothers and sisters of the deceased, whether of the full or half blood, and their children, and grand chil-

Laws of
South and
North
Holland
as to
Intestacy.

(1) Pol. Ord. Art. 20. Plac. 1599. Art. 1.

(2) Pol. Ord. Art. 21. Plac. Art. 2.

(3) Pol. Ord. Art. 22.

(4) Interpr. Holl. 13 May 1594.

(5) Pol. Ord. Art. 26. Interpr. 13 May 1594.

Laws of
South and
North
Holland
as to
Intestacy.

dren, by representation, the whole of the inheritance; namely, the surviving parent takes one half, and the brothers and sisters, and their children, the other half. This must be understood of half brothers and sisters, and their children, who are related to the intestate by the side of the deceased parent.

In case there is no full or half brother or sister alive, then the surviving parent inherits the whole, although there may be children or grand children of the deceased brothers and sisters.⁽¹⁾

4th. Father and mother both failing, the property of the intestate goes to his brothers and sisters, whether of the whole or half blood, and their children, and grand children, by representation.⁽²⁾

The half brothers and sisters divide but *with the half hand*, as it is termed;⁽³⁾ i. e. the inheritance is divided into two parts, the one half the full brothers and sisters divide with the half brothers and sisters of the father's side; and the other half they divide with those of the mother's side; but if there are only half brothers and sisters of one side, the full brothers and sisters take then, in the first place, one half

(1) Plac. van 1599. Art. 3.

(2) Pol. Ord. Art. 22. Plac. Art. 4.

(3) Pol. Ord. Art. 23.

of the goods, and divide the other half with the half brothers and sisters.⁽¹⁾

5th. When full brothers and sisters, or their children, or grand children fail, and there are half brothers and sister's children, or grand children, on both sides alive, then one half of the goods goes to the half brothers and sisters, or their children, and grand children, *per stirpes* on the father's side; and the other half to the half brothers and sisters on the mother's side their children and grand children as before.⁽²⁾

6th. In case all the half brothers and sisters, their children, and grand children, are related to the intestate only on one side; then according to the law of South Holland, they take only half of the goods, and the other half goes to the next of kin of the other side.⁽³⁾

But in North Holland, these half brothers and sisters, their children, and grand children, who are related to the intestate only on one side, take the whole of the goods; unless there be a grandfather or grandmother, or higher ascendant yet alive, related to the intestate on the other side; since then, such half brothers and sisters, their children, and grand children, would

Laws of
South and
North
Holland
as to
Intestacy.

(1) Interpr. 13 May 1594. Plac. Art. 4.

(2) Pol. Ord. Art. 23 et 27. Plac. Art. 5.

(3) Pol. Ord. Art. 27.

Laws of
South and
North
Holland
as to
Intestacy.

only take one half, and the next ascendant or ascendants *per capita* the other half.⁽¹⁾

7th. According to the South Holland law of intestacy, although those who succeed to the inheritance are all equally near in degree to the intestate, yet they take *per stirpes* and not *per capita*.⁽²⁾ But according to the law of North Holland, they take in this case *per capita*, and not *per stirpes*.⁽³⁾

8th. All the persons above enumerated, failing, then, according to the law of South Holland, all the goods of the intestate, go to the next descendants of brothers and sisters grand children, *per capita*,⁽⁴⁾ after these to the grandfathers and grandmothers of both sides, if both be alive; but if one of these be dead, either grandfather or grandmother, then his or her share goes to the nearest relations on such deceased grandfather's or grandmother's side;⁽⁵⁾ viz. to the uncles and aunts of the intestate, and their children of the first degree by representation, in such way that the goods being divided into two parts, one half goes to the father's, and the other to the mother's side, the next of kin

(1) Plac. Art 6.

(2) Pol. Ord. Art. 28.

(3) Plac. Art. 11 et 12.

(4) Pol. Ord. Art. 24 et 28. Interpr. 13 May 1594.

(5) Pol. Ord. Art. 25 et 26. Interpr. 1594.

of the half bed, dividing only with the *half hand*.⁽¹⁾

When there are no uncles or aunts, then their children of the first degree take *per stirpes*, and on failure of these then the nearest collaterals *per capita*.⁽²⁾

Laws of
South and
North
Holland
as to
Intestacy

9th. But according to the law of North Holland, when all the persons enumerated in articles 1 to 7 fail, the inheritance goes first to the nearest, in the ascending line *per capita*; although it should happen that on the one side, both the grandfather and the grandmother, and on the other side, only one of these parents should be alive.⁽³⁾ After these to the nearest descendants of brothers or sisters grand children, *per capita*, whether of the full or half blood.⁽⁴⁾ Afterwards to uncles and aunts, and their children, of the first degree, by representation.⁽⁵⁾ Uncles and aunts failing, then to their children of the first degree, and also great uncles and aunts with them *per capita*, and after all these to the next of kin, also *per capita*, to the exclusion of all who are in a more remote degree.⁽⁶⁾

(1) Pol. Ord. Art. 23, 24, et 27. Interpr. 1594.

(2) Pol. Ord. Art. 28.

(3) Plac. van 1599. Art. 7.

(4) Plac. Art. 8.

(5) Plac. Art. 9.

(6) Plac. Art. 10.

SECT. III.

Special
points with
respect to
inherit-
ance *ab*
Intestato.

With respect to the law of inheritance *ab intestato*, the following peculiar distinctions are also to be observed.

1. As regards the personal or moveable property, that the succession by intestacy is regulated by the law of the place of the testator's decease, (*Sterfhuis* or *Domus Mortuaria*),⁽¹⁾ unless this place happens to be any other than his accustomed place of residence or domicile,⁽²⁾ but with respect to immoveable property, this follows the law of the situation or *lex loci rei sitæ*.⁽³⁾

2. That children, or grandchildren, by representation, becoming with their brothers and sisters heirs, *ab intestato*, to their deceased parents, or grandfathers or grandmothers, must in order to be admitted to an equal division, bring into *hotch pot* (*Collatie*), all that they have already received from the deceased parents, above the others, either on marriage, or to establish them in any trade or business.⁽⁴⁾

3. That man and wife cannot be heirs to each

(1) De Groot, Inleid. 2 B. 26 D. S. 12. n. 4.

(2) Bynkershoek, Quæst. Jur. Priv. Lib. 1. Cap. 16.

(3) De Groot, Inleid. 2 B. 26 D. S. 12. n. 5. et 2 B. 29 D. S. 3. Voet, ad tit. ff. ad Sct. Tertull. n. 34.

(4) D. D. ad tit. ff. de collat. Pol. Ord. Art. 29. S. Van Leeuwen, R. H. R. 3 B. 16 D. Lybregts, Red. Vert. over't Not. Ambt. 1 D. 14 Hoodfdst.

other, *ab intestato*, except according to the law of North Holland, when no next of kin of the intestate are to be found.⁽¹⁾

Special points with respect to inheritance *ab Intestato*.

4. That illegitimate children succeed to the inheritance of their mother *ab intestato*, as the mother makes no bastard.⁽²⁾ But are they, in like manner, admissible to the inheritance, *ab intestato*, of their mother's relations? We are inclined to the opinion of those who answer this question in the negative.⁽³⁾

5. That bastards who leave children born in lawful wedlock, may be succeeded by these as heirs *ab intestato*, and on failure of children, the goods go to the next of kin on the mother's side, so as to exclude the crown.⁽⁴⁾

6. That when any one dies intestate, without next of kin or heirs, the estate escheats to the crown;⁽⁵⁾ but this failure of heirs must be complete, since, if any of kin can be found, even beyond the tenth degree, they take the

(1) De Groot, Inleid. 2 B. 30 D. S. 2. Loenius, Decis. Cas. 108. Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 12. V. D. Vorm, Versterf, regt. pag. 195-208.—(Edit. Blondeel.)

(2) De Groot, Inleid. 2 B. 27 D. S. 14.

(3) Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 11. V. D. Vorm, Versterf. regt. pag. 209-236. V. D. Keessel, Thea. 342-345.

(4) De Groot, Inleid. 2 B. 31 D. V. D. Vorm, Versterf. regt. pag. 237-241. V. D. Keessel, Thea. 368.

(5) T. t. C. de bon. vacant.

Special
points with
respect to
inherit-
ance *ab*
Intestato.

goods.⁽¹⁾ So also when the next of kin of one side fail, their part does not escheat, but goes to the next of kin on the other side.⁽²⁾

(1) Loenius, Cas. 122. Voet, ad tit. ff. ad Sct. Tertull. n. 22.

(2) V. D. Keessel, Thes. 366 et 367.

CHAPTER XI.

Of the Right of Servitude.

SECT. I.

THE *third* sort of *real rights* is the right of *servitude*, whereby an inheritance, whether it be a house or land, is bound or subject to the use or convenience of a neighbouring house or land; or, again, the servitude or use may be of the thing to a person. Servitudes in general.

Servitudes are thus *real* or *personal*.⁽¹⁾

The real are land or house servitudes.

The personal are the usufruct, or right of use of another's property; also rights reserved on grants of land, leases, &c., as tythes, fines, or quit rents, and the like. We will just notice all these shortly.

SECT. II.

To the right of rural prædial, or land servitudes,⁽²⁾ pertains the right of a path or footway over another's land.⁽³⁾ Again, the right of house-way.⁽⁴⁾ The right of cattle-way, or of Rural or Prædial servitudes.

(1) L. 1. ff. de Servit.

(2) Servitutes prædiorum rusticorum.

(3) Pr. Inst. de Serv. præd. L. 1. ff. de Serv. præd. rust.

(4) L. 7. L. 12. ff. eod.

Rural or
Prædial
servitudes.

driving our beasts over the lands of another.⁽¹⁾ The right to pass over another's grounds with horses and carts.⁽²⁾ When any person's land has no passage to the king's or public highway or parish road, a sufficient way is assigned to him by the magistrate.⁽³⁾ The right to draw water from another's well or cistern,⁽⁴⁾ or to conduct it from another's grounds.⁽⁵⁾ The right to drain through another's ground. The right to travel or pass through the water on another's ground, or to water his cattle therein.⁽⁶⁾

SECT. III.

House, or
urban ser-
vitudes.

House, or urban servitudes⁽⁷⁾ may be illustrated as follow :—The right to build against another's wall.⁽⁸⁾ On a wall common to two or more persons we cannot build higher than the half of the height,⁽⁹⁾ nor place thereon any oven or privy.⁽¹⁰⁾ A common wall must be kept up at the

(1) L. 7. L. 12. L. 13. ff. eod.

(2) L. 1. L. 7. L. 8. L. 23. ff. eod.

(3) De Groot, Inleid. 2 B. 35 D. S. 7-12. Voet, ad tit. ff. de Serv. præd. rust. n. 4.

(4) L. 2. S. 1. L. 5. S. 1. L. 9. ff. eod.

(5) L. 1. pr. L. 9. L. 15. ff. eod.

(6) L. 1. S. 1. ff. eod.

(7) Servitutes prædiorum urbanorum.

(8) L. 33. ff. de Serv. præd. urb.

(9) De Groot, Inleid. 2 B. 34 D. S. 4. Voet, ad tit. ff. de Serv. præd. urb. n. 17.

(10) Regtsgeel Observ. 3 D. Obs. 51.

common charge.⁽¹⁾ The right to fix a beam or cramp for support on another's house,⁽²⁾ to convey the rain from one's own roof upon it,⁽³⁾ or to receive the rain from it.⁽⁴⁾ To prevent the next house from being raised higher,⁽⁵⁾ or my neighbour from obstructing my view.⁽⁶⁾ To have a window opening on another's ground.⁽⁷⁾ To have a channel or water-course therein.⁽⁸⁾ To prevent my neighbour from opening a window upon my ground.⁽⁹⁾ Concerning these and similar house servitudes, the several local ordinances of such place must be consulted.

House, or
urban ser-
vitudes.

SECT. IV.

Servitudes of lands as well as of houses are acquired by agreement and mutual consent;⁽¹⁰⁾ by last will;⁽¹¹⁾ by prescription, even of a year and a day, according to the ordinances of several places.⁽¹²⁾

How ac-
quired,
and lost.

(1) De Groot, Inleid. 2 B. 34 D. S. 6.

(2) L. 2. ff. de Serv. præd. urb.

(3) D. L. 2.

(4) D. L. 2.

(5) D. L. 2. Regtsgel. Observ. 3 D. Obs. 53.

(6) L. 2. L. 12. L. 17. ff. de Serv. præd. urb.

(7) Voet, ad tit. ff. de Serv. præd. urb. n. 9.

(8) L. 7. ff. de Servit.

(9) L. 8. C. de Serv. et aqua.

(10) S. 4. Inst. de Serv. præd.

(11) D. S. 4.

(12) De Groot, Inleid. 2 B. 36 D. S. 5. Regtsgel Observ. 3 D. Obs. 56.

How ac-
quired,
and lost.

They are lost by merger of the two properties in the same person,⁽¹⁾ since the use of one's own possessions is founded on the right of property, and not on that of servitude;⁽²⁾ by releasing the right;⁽³⁾ by suffering or permitting any thing that is contrary to the nature of servitude;⁽⁴⁾ when any one or other of the properties is destroyed;⁽⁵⁾ when the right of the person who granted it expires.⁽⁶⁾

Lastly, by non-occupation or non-user for the third part of a century,⁽⁷⁾ although free opportunity was afforded.

SECT. V.

Usufruct.

Under personal servitudes, must be reckoned, in the first place, the right of usufruct; i. e. the right to enjoy the fruits of a thing that belongs to another, so that the thing itself is not thereby prejudiced or diminished in value.⁽⁸⁾ The ways in which this right is lost or acquired are substantially the same with those we have

(1) L. 1. ff. quemadm. Serv. amitt.

(2) According to the rule *Res sua nemini servit*. L. 26. ff. de serv. præd. urb.

(3) L. 35. ff. de Reg. Jur.

(4) L. 8. ff. quemadm. Serv. amitt.

(5) L. 14. ff. eod.

(6) L. 11. ff. eod. S. 1.

(7) L. 7. L. 10. S. 1. L. 11. L. 18. ff. eod. Vcet, ad d. t. n. 7.

(8) L. 1. ff. de usufr.

just mentioned. We must only observe, that Usufruct.
as this kind of servitude is not incident to a thing, but to a person, the usufruct expires with the person having such use for life,⁽¹⁾ whose heirs thus cannot enjoy the fruits after this event.⁽²⁾

As the right is confined to the enjoyment of the fruits of the thing, so the usufructuary must take care that the thing, after the expiration of his term, be returned in a good state to the owner, for which he is also bound to give security,⁽³⁾ and therefore he may not alienate or incumber the thing;⁽⁴⁾ but, on the contrary, is liable to the usual costs and charges of keeping it in a proper state.⁽⁵⁾

SECT. VI.

The further examples of *personal servitudes* Further
personal
servitudes.
consist in :

1. The right of *use*, which is less than that of *usufruct*, and does not extend to the enjoyment or perception of all kinds of fruits.⁽⁶⁾

2. The right of *inhabiting* a house.⁽⁷⁾

(1) S. 3. Inst. de usufr.

(2) L. 26. ff. de usufr.

(3) T. t. ff. usufr. quemadm. Cav.

(4) L. 13. S. 4. ff. de usufr.

(5) De Groot, Inleid. 2 B. 39 D. S. 6. Regtsgel Observ.
3 D. Obs. 60.

(6) T. t. Inst. et ff. de usu. et habitat.

(7) S. 5. Inst. de usu. et habit.

Further
personal
servitudes.

3d. An annual rent arising from another's lands.⁽¹⁾

4. The right to *tythes*, consisting in the eleventh part of some fruits, whether of corn, which are termed *great tythes*; or of other fruits, which are termed *small tythes*; or of the young of beasts, which are termed *crying tythes*;⁽²⁾ and—

5. The right to fines or quit rents, &c.⁽³⁾

(1) De Groot, Inleid. 2 B. 40 D.

(2) De Groot, Inleid. 2 B. 45 D. V. D. Schelling. Holl. Tiendrecht, 2 Deelen, in 8vo.

(3) De Groot, Inleid. 2 B. 46 D. S. Van. Leeuwen. Cens. For. Pi. Lib. 2. Cap. 17.

CHAPTER XII.

Of the Right of Pledge or Mortgage.

SECT. I.

THE fourth and last sort of real rights is the right of pledge whereby any thing is specially bound to the creditor for further security of his debt. Right of pledge or mortgage.

This right of pledge or mortgage is either given by the law, and is then termed a *legal mortgage*, or it arises from the agreement of the parties themselves, and is then termed a *conventional mortgage*.

SECT. II.

The law grants tacitly and without any previous agreement of the parties being thereto necessary, Legal mortgages.

The right of legal mortgage, first, to persons entitled to fines or quit-rents, &c., as being a right reserved by the original owners of the property.⁽¹⁾

For dyke duties, to keep them in repair, and so for dams, sluices, mills, and the like.⁽²⁾

(1) De Groot, Inleid. 2 B. 48 D. S. 11. Voet, ad tit. ff. in quib. caus. pign. n. 27.

(2) De Groot, d. l. S. 12. Voet, ad d. t. n. 31.

Legal
mortgages.

To masons, carpenters, builders, and others, for the *repairs* (but not for the ornaments and improvements) made by them on any building, or for materials furnished for this purpose.⁽¹⁾ By the local ordinances of different towns, this right is limited to repairs done within the last *two* or *three* years.⁽²⁾ To the crown, on the goods of those who are in any way employed in the collection of the revenue.⁽³⁾ In other cases, when the crown is a creditor with others on an insolvent estate, it has no further right than other creditors,⁽⁴⁾ neither with respect to fines.⁽⁵⁾

To wards, on the property of their guardians, to make good what the ward has suffered by their mal-administration.⁽⁶⁾

To the landlord of a house or lands, upon all the moveable property brought thither by the

(1) Voet, ad d. t. n. 28.

(2) See the laws of Haarlem, Alkmaar, Purmerend, the Hague, Amsterdam, Rotterdam, and Monnikendam, quoted by Professor V. D. Keessel, Thes. 467.

(3) Boel on Loenius, Decis. Cas. 17. p. 108-201. Gener. Plac. of 22 July 1749, Art. 26.

(4) Resol. Holl. 25 Feb. 1678, in the Gr. Pl. Boek, 3 D. pag. 591.

(5) Groenewegen, de L. L. abrog. ad tit. C. de poen. fiscal. Voet, ad tit. ff. in quib. caus. pign. n. 9.

(6) L. 20. C. de adm. tut. Lybregts, Red. Vert. 1 D. 30 Hoofdst. n. 64. et seqq.

tenant, as also upon all the emblements or fruits of the land.⁽¹⁾ Legal mortgages.

To bleachers of linen and the like, for their charges.⁽²⁾

To towns and villages, on the property of their receivers.⁽³⁾ Also to churches, on the goods of the administrators of the church property.⁽⁴⁾ To the master of a vessel, on the ship and cargo, for the security of the freight.⁽⁵⁾ To the freighter or merchant, on the ship belonging to the master, for compensation of his property sold by the master in cases of necessity.⁽⁶⁾

To a factor or agent, on the goods of his principal for previous advances to the owner on these goods.⁽⁷⁾

To a woman, who has married without the community of goods, on the property of her husband for the restitution of the property brought by her on marriage, or acquired by

(1) De Groot, Inleid. 2 B. 48 D. S. 17. Regtsgeel Observ. 1 D. Obs. 72. V. D. Keessel, Thes. 423.

(2) Plac. Holl. 20 Jann. 1614, et 9 May 1732.

(3) Resol. Holl. 19 July 1625, et 24 Feb. 1679. Loenius, Decis. Cas. 69.

(4) Decis, et Resol. v. d. Hove van Holl. n. 355.

(5) De Groot, Inleid. 2 B. 48 D. S. 19. Roccus, van Schepen en Vragtgelden, pag. 117, seqq.

(6) De Groot, d. 1. S. 20. Verwer, Nederl. Zeerechten, pag. 28, seqq.

(7) De Groot, d. 1. S. 21. Neostadius, Decis. Cur. Holl. 45. Handv. van Amsterdam, 2 D. p. 539.

Legal
mortgages.

her during marriage.⁽¹⁾ And lastly, to legatees, on the property of the testator, for the security of their legacies.⁽²⁾

SECT. III.

Conven-
tional
mortgages.

A conventional mortgage is that which is not, like the preceding, induced by operation of law; but takes place by express agreement of the parties, and relates either to moveable or immoveable property.

With respect to the pledge or obligation of moveable property, in order to render it effectual against not only the debtor himself, but also against third persons, delivery of the thing to the creditor is necessary.⁽³⁾

This is termed, with us, a pawn, or deposit (*Pand ter minne*); and all kinds of moveable property may be pledged in this way, except that which is of the nature of pawns or pledge to pawn-brokers.⁽⁴⁾

With respect to securities on *immoveable property*, or on property which is of that nature, such as redeemable and life annuities, obliga-

(1) L. un. S. 1. et 15. C. de rei ux. act: L. 12. S. 1. C. qui pot. in pign. S. 29. Inst. de action.

(2) Voet, ad tit. ff. in quib. caus. pign. n. 21.

(3) De Groot, Inleid. 2 B. 48 D. S. 25-29. Regtsgel Obs. 3 D. Obs. 68. Voet, ad tit. ff. de pign. et hyp. n. 12.

(4) Handv. van Amsterdam, 2 D. pag. 681, and the pawn-brokers' laws in several towns.

tions entered into before the court of aldermen, bonds or obligations for the remainder of the purchase-money of any houses or lands and the like, the pledging of these is not good, unless the act be done before the court or commissaries, and the government duties thereon of two-and-half per cent., and the additional tenth, be paid.⁽¹⁾

Conven-
tional
mortgages.

A conventional mortgage is also of two kinds, *general* or *special*. The general mortgage extends to all the goods of the mortgager, but is not valid unless the duty of two-and-half per cent. be paid;⁽²⁾ and this obligation may be passed either before the court or before a notary and witnesses, or even by a private act.*

A special mortgage, so far as it concerns immoveable property requires, besides the payment of the duty of two-and-half per cent. and the additional tenth, to be passed before the court.⁽³⁾

(1) Plac. 9 May, 1529. Pol. Ord. Art. 35. Waarschouw, 5 Feb. 1665. Ordonn. op. den. 40. penn. van. 9 May, 1744. Art. 2, 16, 17, et 18.

(2) Waarschouw, 5 Feb. 1665.

(3) See the above quoted Plac. Waarsch. et Ordonn.

* This is not the case at Demerara, where all mortgages must be passed before two members of the Court of Justice, or Commissaries, after three previous notices in the Colonial Gazette, and then registered; but no government duty is payable thereon.—T.

SECT. IV.

Prefer-
ence.

The effect of *pledge or mortgage* is the right of preference; concerning which the following points deserve consideration :

1. When goods belonging to another are found in an insolvent estate, these are reclaimed by the owner, without his being concerned in the question of preference.⁽¹⁾

2. The first preferent claim on the proceeds of the insolvent estate, is the judicial costs, including those of curators and others for its administration, &c.⁽²⁾

3. In the next class of preference are, the costs of the funeral, the rent of the house or land, servants' wages for the current year, government and town taxes.*⁽³⁾

4. With respect to *special mortgages* made according to the law of the place, the mortgagee is preferent on the proceeds of the sale of the mortgaged property,⁽⁴⁾ after the taxes due on it

(1) Voet, ad tit. ff. qui pot. in pign. n. 13. V. D. Keessel, Thes. 448.

(2) V. D. Keessel, Thes. 451.

(3) V. D. Keessel, Thes. 452. seqq.

(4) Pol. Ord. Art. 35.

* How these rights are qualified and limited, as well as all the other general positions of the author, will be seen by reference to the authorities on each head.—T.

are satisfied, and the charges for necessary repairs for the last two or three years which are preferent.⁽¹⁾ Where there are several special mortgages of the same thing, the oldest is preferent.⁽²⁾

Preference.

5. Next to these, rank *legal* and *general* mortgages, among which, *Qui prior est tempore potior est jure.*⁽³⁾ But the prior legal mortgage, or that which is induced by operation of law, is preferent to a *posterior conventional* special mortgage.⁽⁴⁾ A *general mortgage* passed, on payment of the duty of two-and-half per cent., affects all the property wherever situate,⁽⁵⁾ unless the particular laws of any state make an exception.⁽⁶⁾

With respect to two general mortgages when the duty has been paid on each, and the oldest is by a private instrument, the youngest by a notarial act, the latter is preferent.⁽⁷⁾

(1) V. D. Keessel, Thes. 466, et 467.

(2) V. D. Keessel, Thes. 469.

(3) De Groot, Inleid. 2 B. 48 D. S. 35. Regtsgel Observ. 4 D. Obs. 38.

(4) De Groot, d. l. S. 36. V. D. Keessel, Thes. 437.

(5) Pol. Ordon. Art. 35.

(6) Handvest van Amsterdam, 2 D. pag. 532. seqq. Mieris, Handv. van Leyden, pag. 190. At Amsterdam this particular law is also in force, that older general mortgages have the preference over younger special. Handv. d. l. pag. 533.

(7) L. 11. C. qui pot. in pign. See our Anteeck, op. Merula's Man. van Proced. 2 D. pag. 188.

Prefer-
ence.

6. After payment of the preferent claims, if there is a residue, the concurrent or simple contract creditors share this *pro rata*.⁽¹⁾

SECT. V.

Sale of the
pledge, or
thing
mort-
gaged.

When the debt secured by pledge or mortgage becomes due, the creditor is not at liberty to sell the pledge or thing mortgaged without a decree of the court or judgment to this effect,* for which purpose he must produce to the court an act of *willing condemnation*, on the part of the debtor, if the obligation contains this clause, or in default thereof, sue the debtor for payment, and conclude that on default thereof the mortgaged property may be declared bound and executable.⁽²⁾

When this decree is obtained, then execution is levied on the mortgaged property, with all the formalities attendant upon a judgment *in Judicio Contradictorio*.⁽³⁾

With respect to the sale of things given in pledge, such as life rents, annuities, rent charges,

(1) Voet, ad tit. ff. qui pot. in pign. n. 36.

(2) De Groot, Inleid. 2 B. 48 D. S. 41. Voet, aliiq. D. D. ad tit. ff. de distr. pign.

(3) See my Verhand. over de Judic. Pract. 2 D. 3 B. 6 Hoofdst.

* For the principal points of difference, between a Dutch and English mortgage, see Appendix to the Judgment of the Court of Demerara, in the case of Odwin and Forbes—Letter G.—Appendix.—T.

&c., deposited with the creditor as security ; among which are also included government securities,⁽¹⁾ a judicial decree is also necessary,⁽²⁾ for although the mortgagee is generally accustomed to insert in the mortgage deed, a covenant that in default of payment he shall be entitled to sell, which covenant is lawful,⁽³⁾ yet it is more prudent in this case, previously to proceeding to a sale, to obtain the authorization of the Court.

Sale of the
pledge, or
thing
mort-
gaged.

SECT. VI.

The right of pledge or mortgage ceases,

1st. When the debt which founds the obligation is discharged by payment, *novation* or accepting another security, compensation or set off, release of the debt, merger, or the like.⁽⁴⁾

How the
right of
pledge or
mortgage
expires.

2d. By release of the thing mortgaged ; the debt then remaining only as a concurrent and simple contract, or unprivileged debt.⁽⁵⁾

3d. In the case when a mortgager sells the thing mortgaged, with the consent of the mortgagee.⁽⁶⁾

4th. When the thing mortgaged perishes.⁽⁷⁾

(1) V. D. Keessel, Thes. 430.

(2) De Groot, d. S. 41.

(3) L. 4. ff. de pign. act.

(4) Voet d. tit. ff. quib. mod. pign. vel hyp. solv. n. 2.

(5) Voet, ad d. t. n. 5.

(6) Voet, ad d. t. n. 6 et 7.

(7) Voet, ad d. t. n. 14.

How the
right of
pledge or
mortgage
expires.

5th. By the effluxion of time when limited by the mortgage deed;⁽¹⁾ and lastly, by prescription of 30 or 40 years, provided no interest has been paid in the mean time to rebut the prescription.⁽²⁾

(1) Voet, ad d. t. n. 10.

(2) De Groot, Inleid. 2 B. 48 D. S. 44. V. D. Keessel, Thea. 443.

CHAPTER XIII.

On the Right of Possession.

SECT. I.

Although properly and accurately speaking, the *right of possession*, cannot be classed as a fifth sort of *real rights*;⁽¹⁾ yet, possession with regard to its nature and consequences, is too important not to require a separate consideration.

Possession is the actual retention of a thing, with the purpose of keeping it for one's self. Both these parts of the definition are necessary to constitute possession; simple possession without this object is insufficient; since, for example, a lessee, or an attorney, or agent, or a depositary, or person to whom any thing is committed in charge, cannot, in a legal sense, be said to possess the thing in question.⁽²⁾ Neither does the mere object, or design to possess any thing without actual detention thereof, create the right of possession.⁽³⁾ Both these requisites must

(1) See above, page 113.

(2) L. 2. C. de præscr. 30 vel 40 ann. L. 9. ff. de reivind. L. 1. S. 20. L. 3. S. 20. ff. de acq. vel am. poss. L. 16. ff. de per. et comm. reivend. L. 1. S. 22. de. ff. de vi et vi arm.

(3) L. 3. S. 1. ff. de acq. vel am. poss. L. 10. C. de acq. vel ret. poss.

Right of
possession.

fail, before we can be said to have lost possession.⁽¹⁾

SECT. II.

Conse-
quences of
possession.

The following examples may be given of the special nature, and consequences of the right of possession.

1st. This right has nothing common with that of property,⁽²⁾ which always requires a lawful title for its acquisition, which is not necessary for possession.⁽³⁾ Possession is therefore of two kinds, possession *bona fide*, and possession *mala fide*.⁽⁴⁾

2d. No one without a previous judgment, or decree, may be dispossessed;⁽⁵⁾ and even were he to be dispossessed, on the ground of the right of property in another, he must first be restored to the possession, before this title can be gone into.⁽⁶⁾

(1) L. 8. L. 27. ff. de acq. vel am. poss. L. 153. in fin. ff. de Reg. Jur.

(2) L. 12. S. 1. ff. de acq. vel am. poss.

(3) L. 11. C. de petit. hered. L. 25. ff. de jure fisci.

(4) De Groot, Inleid. 2 B. 2 D. S. 9-11.

(5) De Groot, d. l. S. 6. Regtsgeel Observ. 2 D. Obs. 26.

(6) L. 35. ff. de acq. vel am. poss. L. 3. C. de interd. S. 4. Inst. eod. L. 1. S. 3. ff. uti possid. L. 3. C. quor. bon.

Under this head belongs also the well known rule, *Spoliatus ante omnia est restituendus*.

SECT. III.

Under the head of possession, there are different remedies or modes of proceeding, according to our practice.

Proceedings with respect to possession.

1. The proceeding to obtain possession is termed a mandament, or writ of immission, (*mandament van immissie*), which is scarcely ever used but in the case when one co-heir is ousted of his possession by another.⁽¹⁾

2. The proceeding to retain quiet possession against all those who seek to disturb us therein. This is termed a *mandament van maintenue*.⁽²⁾ To found this writ, a possession obtained neither secretly, nor by force, nor on condition of quitting on first notice, is necessary on the part of the applicant.⁽³⁾

3. To recover possession when lost by the *mandament van complainte*.⁽⁴⁾ For this remedy a quiet and undisturbed possession of more than a year and a day is required; and further, that we have been dispossessed within a year before the application.⁽⁵⁾ With respect to those who have

(1) See my Verhand, over de Judic. Pract. 2. B. 20. Hoofdst. S. 1. Keuren van Leijden, Art. 185.

(2) Verhand over de Judic. Pract. d. 1. S. 2. 4.

(3) Voet, ad tit. ff. uti. possid. n. 2.

(4) Verh. over de Judic. Pract. 2. B. 21. Hoofdst.

(5) Inst. Hof. Art. 39. Inst. H. R. Art. 195. Bort, Tract. van Complainte, tit. 5. n. 36. et 38. et tit. 6. n. 7.

Proceed-
ings with
respect to
possession.

been dispossessed by force, a remedy is given by the canon law,⁽¹⁾ adopted in our practice, termed *a mandament van spolie*.⁽²⁾

(1) Cap. Sæpe contingit 18. X. de resti spoliat. et Can. redintegranda, 3. et 4. Caus. 3. quæst. 1.

(2) Verhand, over de Judic. Pract. 2. B. 22. Hoofdst. Leyser, Medit. ad ff. Tom. 7. Spec. 504—506. F. C. Fleck. Comment. de interdicto unde vi, et remedio Spolii, (Lips. 1797.)

CHAPTER XIV.

On Obligations and the personal Rights arising therefrom in General.

SECT. I.

HAVING hitherto treated of *real rights*, or rights *in* a thing, we shall now proceed to *personal rights*, or rights *to* a thing, whereby not the thing itself, but the person with whom we have contracted is bound to us, either to give us something or to do something.

General
nature of
obligations.

When on this head we speak of obligations, we are to be understood as speaking of that kind of right which entitles us to compel by law the other party to the fulfilment of the obligation, since imperfect obligations, such as those of love, gratitude, and the like, belong to morals and ethics, and are not within the province of municipal law.⁽¹⁾

Of the essence of a perfect obligation is,

1. That it have a lawful cause or origin.
2. That the contracting parties are capable of binding themselves.
3. That the thing contracted for be capable of being made the subject of an obligation.

(1) Pestel, Fundam. Jurispr. Natur. S. 288. seqq.

SECT. II.

Contracts.

The most general cause of obligation is *contracts*, that is an agreement whereby both parties, or only one of them covenants and binds himself to another, either to give him something, or to do or refrain from some particular act.⁽¹⁾

When not valid.

All contracts derive their validity from the mutual and free consent of the contracting parties :

Consequently, contracts are invalid and not binding,

1. When the parties are in error⁽²⁾ with respect to the object of the agreement, as when one thinks he is giving the thing as a loan, the other that he is taking it as a gift,⁽³⁾ or in a substantial and not in an accidental *quality* of the thing, as when one thinks he is purchasing silver and the article proves to be plated ;⁽⁴⁾ or in the person with whom we contract as when we take him for another person.⁽⁵⁾

2. When the consent of one of the parties has been extorted by undue violence or fear,⁽⁶⁾

(1) Pothier, van Contr. et Verbint. 1. D. pag. 7.

(2) L. 116. S. 2. ff. de Reg. Jur. L. 57. ff. de obl. et act.

(3) L. 9. ff. de contr. empt.

(4) L. 14. L. 41. S. 1. ff. de Contr. empt. J. Averanius, Interpret. Jur. Lib. 1. Cap. 19.

(5) Pothier, Van Contr. et Verbint. 1. D. pag. 29.

(6) T. t. ff. quod. met. caus. De Groot, Inl. 3. B. 48. D. S. 6.

provided this violence be of such a nature as to be capable of acting upon a man of fair courage,⁽¹⁾ in the determining of which the judge must be guided by the circumstances; for example, a degree of fear which cannot be supposed sufficient to have disturbed or influenced the mind of a man of full age, or of a military person, may, however, have been quite sufficient to have acted upon a female or an old man.⁽²⁾

When not
valid.

3. When one of the parties has been drawn into the contract by *deceit* on the part of the other.⁽³⁾ This principle, however, is not extended to cases of trifling damage or prejudice occasioned by the fraud or misrepresentations of one of the parties, and which may be easily repaired by an action for damages. That only which is a manifest violation of good faith, is held by the judge to be such a fraud as will justify the rescinding of the contract itself; for example, all fraudulent or knavish dealings of the one party to induce the other to contract with him, and without which he would not have entered into the agreement.⁽⁴⁾

4. When the price we have agreed to pay for

(1) L. 6. L. 7. ff. d. t.

(2) Voet, ad d. t. ff. n. 11. Leyser, Medit. ad ff. Tom. 7. Spec. 517. Medit. 1. 3.

(3) T. t. ff. de dol. mal. De Groot, Inleid, 3. B. 48. D. S. 7.

(4) Pothier, Van Contract, et Verbint, 1. D. pag. 43. et 44.

When not
valid.

a thing enormously exceeds its real value : this is fixed at half the value of the highest price the thing in contract was really worth at the time.⁽¹⁾

Besides *the invalidity of contracts* on the ground of the want of free and mutual consent, they are also void when they are made without a consideration, or for a false consideration, or for a consideration which is repugnant to justice, good faith, or good morals.⁽²⁾

SECT. III.

What persons are
capable of
binding them-
selves.

It is essential to all agreements that the parties contracting are capable and entitled in law to bind themselves. Therefore neither children, idiots, nor lunatics, so long as they remain such, are capable of contracting, except by the interposition of their guardians and curators.⁽³⁾

Those also who are in such a state of drunkenness as to have entirely lost the use of their reason, are incapable for the time.⁽⁴⁾

Married women also are incapable of contracting or binding themselves to others without the consent and assistance of their husbands.⁽⁵⁾

(1) L. 2. C. de rescind. vend. De Groot, Inleid, 3. B. 52. D.

(2) T. t. ff. de cond. caus. dat. caus. non. sec.—de cond. ob turp. vel inj. caus.—de cond. indeb.—de cond. sine caus.

(3) See above, pages 105, 106, 109, and 110.

(4) De Groot, Inleid, 3. B. 14. D. S. 5.

(5) See above, page 84.

Prodigals also are incapable to contract so soon as the administration of their property is taken from them by the appointment of curators.⁽¹⁾

What persons are capable of binding themselves.

It is also a fundamental rule of law on this head, that only that which one of the contracting parties has covenanted *for himself*, and on the other hand, only that which the other party has promised *for himself*, or *on his part*, can be the subject of a contract,⁽²⁾ since to covenant or undertake *for a third person* is of no effect except this third person confirms it by his consent, and acquires some right thereby.⁽³⁾ This, however, is not to be extended so far as to prevent my stipulating that, in place of paying the money to me, it should be paid to a third person;⁽⁴⁾ or to stipulate that any particular

(1) See above, page 110.

(2) S. 19. Inst. de inut. stipul. L. 73. S. ult. ff. de Reg. Jur. L. 83. ff. de verb. obl. Pothier, van Contract, et Verbint, l. D. pag. 68. et seqq.

(3) De Groot, Inleid, 3. B. 3. D. S. 38. We see no reason to deviate from this rule of De Groot with regard to our modern law. It is certainly true that Groenewegen, ad S. 19. Inst. de inut. stipul. et Voet, ad tit. ff. de verb. oblig. n. 3. lay down the doctrine that according to our sense of moral obligations, a person can as well promise and contract for another as for himself; but according to the analogy of our law, neither customs nor degrees can authorize in this respect the proposed abrogation of the Roman Law.

(4) This is termed in law, *adjectus solutionis gratia*.

What persons are capable of binding themselves.

act shall be done for a third person when I myself also have a direct interest in it ;⁽¹⁾ or to stipulate, or engage, so as to bind our heirs,⁽²⁾ or others taking under us ;⁽³⁾ or, lastly, to contract by means of a third person as by an attorney.⁽⁴⁾

SECT. IV.

Rules of Interpretation of contracts.

In the interpretation of contracts, the following rules are to be observed :

1. In the agreement, we must follow the general will and intention of the parties in preference to the literal sense of the words.⁽⁵⁾

2. When a clause or covenant is capable of being taken in two senses, it must be construed in that sense which will render it operative rather than that which would render it of no effect.⁽⁶⁾

3. When, in like manner, the words of a contract may be taken in two ways, they must be construed in that way which is most agreeable to the nature of the contract.⁽⁷⁾

4. That which is ambiguous in a contract is

(1) L. 38. S. 20. 21. et 22. ff. de verb. obl.

(2) L. 10. ff. de pact. dot. L. 38. S. 14. ff. de verb. obl.

(3) L. 17. S. 5. ff. de pact.

(4) Pothier, van Contr. et Verbinten, 1. D. pag. 91. et 98.

(5) L. 219. ff. de verb. sign.

(6) L. 80. ff. de verb. oblig.

(7) L. 4. pr. ff. de usur.

to be interpreted by the usage of the place where it is made.*⁽¹⁾

Rules of
Interpre-
tation of
contracts:

5. Custom or usage is of such authority in the interpretation of contracts, that the usual covenants in a contract are understood to be comprehended in it, although not expressly mentioned.†⁽²⁾

6. One covenant in a contract may be explained by others in the same contract, whether they follow or precede it.⁽³⁾

7. In cases of doubt, the words of the covenant must be taken most strongly against the obligee, and in favor of the obligor.⁽⁴⁾

8. However general the expressions in a contract may be, they are restricted, in interpretation, to those matters only which the parties appear to have contemplated as their objects in contracting, and are not extended to others of which they do not appear to have thought.⁽⁵⁾

(1) L. 34. ff. de Reg. Jur.

(2) L. 18. L. 19. C. de loc. et cond.

(3) L. 126. ff. de verb. sign.

(4) L. 38. S. 18. L. 99. ff. de verb. obl.

(5) L. 9. S. ult. ff. de transact.

* Or where the subject matter, if real, is situate; thus a covenant to cultivate a farm in a husband-like manner, must be interpreted by the custom of the district, for what would be good husbandry in Lincolnshire, may not be good husbandry in Devonshire.—T.

† Vide etiam Voet, ad ff. L. 21. tit. 2. n. 28.—T.

Rules of
Interpre-
tation of
contracts.

9. Under a universal term are comprehended all the species included under it, even those with which the parties themselves may appear to be unacquainted.⁽¹⁾

SECT. V.

Further
causes of
obliga-
tions.

Besides contracts, there are also other causes of obligation, namely, *quasi* contracts, crimes, and *quasi* crimes, which we shall explain hereafter. There are also obligations which take their rise not from any contract, or *quasi* contract, or crime, or *quasi* crime, but solely from the natural principles of law and equity. Of this nature is the obligation of children, when in competent circumstances, to maintain their indigent parents; of a married woman who has borrowed money without the knowledge of her husband, to return this money if she has profited thereby.⁽²⁾

SECT. VI.

Subject of
obliga-
tions.

The subject of an obligation may be either a particular and special thing, which the obligor is bound to give, or a particular act, which he is bound to do, or refrain from doing.

Every thing which is an object of commerce,

(1) L. 29. C. de transact.

(2) See on this the celebrated text of the Roman Law, *Con-dictiones ex lege, actiones in factum, &c.* Westenberg. de caus. oblig. Dis. 3, 4, et 5. Pothier van Contr. et Verbint. 1 D. pag. 133. et 134.

may also form the subject of an obligation, whether the thing be specially defined or not: for example, when any one binds himself to give me a horse without stating which horse, unless the uncertainty be of such a nature as to render the obligation void.⁽¹⁾ The same with respect to things, of which the quantity is actually defined, and of those of which the quantity cannot at the time be defined; as the promise of guarantee or indemnity from damages. So also of things which are already in being, or *esse*, and of those which are *in futuro*, as for instance, the sale of the wine to be made the next vintage. The same may be also said of the contract for things, which belong to the obligor, or to a third person.⁽²⁾ In the latter case he is bound to purchase it from the owner, in order to fulfil his contract, or in case of the refusal of the owner to sell it, to satisfy the other party in damages arising from the non-performance of this contract.^{(3)*}

Subject of obligations.

In order that a particular act may be the subject of a contract, it is necessary that it be possible.⁽⁴⁾

(1) L. 94. ff. de verb. oblig.

(2) L. 28. ff. de contr. empt.

(3) L. 30. S. 1. ff. de act. empt.

(4) L. 85. ff. de Reg. Jur.

* See Lord Thurlow's Judg. in Bro. C. C.—T.

Subject of
obligations.

Under the head of acts considered as impossible, are those which are contrary to law or good morals.⁽¹⁾ The act also to which the party binds himself, must be something precise and definite; thus an engagement to build a house without saying where, is good for nothing.⁽²⁾ The act also must be of that nature, that the party in whose behalf it is stipulated, shall have an interest in its being done, or not done, and it is further necessary that this interest should be capable of being clearly valued in damages.⁽³⁾

SECT. VII.

Consequences of
obligations.

He who contracts to give any thing, is bound to deliver it at a proper time and place, to the other party, or to any one empowered by him to receive it.⁽⁴⁾ If that which is to be given consists in a certain definite thing, the party bound must take good care of it, till the time of payment or delivery, and in case of want of due care, or if, purposely or through neglect, the thing perishes, or is lost or spoiled, he is bound to the other party in damages and interest;⁽⁵⁾ but this is not the case, when it is the consequence of unforeseen accident, or irresistible

(1) L. 15. ff. de cond. instit.

(2) L. 2. S. 5. ff. de eo, quod cert. loc.

(3) Pothier, van Contr. et Verb. 1. D. pag. 149.

(4) T. ff. de solut. ~.

(5) L. 5. S. 2. ff. commod. L. 23. ff. de Reg. Jur.

force.⁽¹⁾ The party is also liable in damages when he does not deliver the thing at the proper time and manner.⁽²⁾

Conse-
quences of
obliga-
tions.

He is also liable for the fruits and interest, from the day that he by due notice has been placed in a state of default.⁽³⁾

The consequence of an obligation by which any one binds himself *to do* any thing, consists in this, that he must do the act stipulated for, and on failure, is liable in damages and interest, to the person in whose behalf he has bound himself.⁽⁴⁾

If the obligation consists in refraining from some particular act, and he does this, he is liable in damages and interest, arising from the prejudice caused by this act to the party, in whose behalf he was bound not to do it.⁽⁵⁾

On the side of the creditor or obligee, the consequence of the obligation is, that he has the right to demand from the debtor, or his heirs, payment or satisfaction of that which he has bound himself to give.⁽⁶⁾

(1) L. 11. S. 5. ff. de minor. L. 52. S. 3. ff. pro. soc. L. 28. C. de loc. cond.

(2) L. 1. pr. ff. de act. empt.

(3) L. 32. S. 2. L. 38. S. 8. et seqq. ff. de usur. L. 5. C. de act. empt.

(4) L. 13. ff. de re judic.

(5) L. 121. ff. de Reg. Jur.

(6) L. 3. ff. de oblig. et act.

Conse-
quences of
obliga-
tions.

This right is enforced either by the usual mode of citation, or by summary execution, when the obligation contains the clause of willing condemnation.*⁽¹⁾

If the obligation consists in the doing some particular act, then the obligee may sue the obligor, for the performance of this act;⁽²⁾ or compensation in damages and interest.†

By *damages and interest*, is understood the loss which any one has sustained, and the profit which he might have made.⁽³⁾ The assessment however of these damages, is subject to some limitation, so as to prevent its being excessive, or exceeding *the double value* of the thing taken according to its intrinsic worth.⁽⁴⁾

(1) Pothier, van Contr. et Verbint. l. D. pag. 163—165.

(2) This is the common opinion, and most received in practice; though on the other hand the rule, “*Nemo potest precise cogi ad factum*,” should seem in our opinion more according to law. See Pothier, d. l. pag. 166. and our notes there.

(3) L. 13. ff. rat. rem hab. Pothier, d. l. pag. 168—189.

(4) L. un. C. de sent. quæ pro eo quod int. This law is also adopted in our practice. Groenewegen, de L. L. abrog. ad. d. L. un. pag. 674. Voet, ad tit. ff. de verb. oblig. n. 10. Bynkershoek, Quæst. Jur. Priv. Lib. 2. Cap. 14. pag. 327.

* Equal to confessing a judgment in the English Law.—T.

† But the justice of sometimes compelling a *Specific Performance* is so apparent, that it has become a branch of the Equity Jurisdiction in England, as no jury could ever satisfactorily assess the *Pretium affectionis*.

SECT. VIII.

Obligations are, according to their different natures and subjects, differently divided.

Different
kinds of
obliga-
tions.

First, into *natural obligations*, which are only binding in conscience :—Into *civil obligations*, which give a right of action :—Into *pure or simple*, which are free from any condition or limitation :—*Conditional*, which are subject to some condition or limitation of time or place : Obligations to *give* some thing, or to *do* something.⁽¹⁾ Again, into *liquid* and *illiquid*, according as it appears from the contract itself or not, what thing is due, or of what nature, or how much :⁽²⁾ Into *limited* and *unlimited* : into *single* and *alternative* ; that is, when the party has contracted to do several different things, but so that the performance of one is a satisfaction of the rest.—Into obligations *in solidum*, wherein each of the obligors is bound in the whole ; and into obligations *non in solidum*, wherein each is only bound for his share, or *pro rata* :—Into *divisible* and *indivisible* :—Into *principal* and *accessary* ; for instance, as bail or security :—Into *primitive* and *secondary* ; for example, to pay the penalty stipulated in case of default :—Into obligations with, or without pledge or mortgage ; with, or without *preference*, &c.

(1) L. 2. pr. ff. de verb. oblig.

(2) L. 74. S. 1. L. 75. ff. d. t.

SECT. IX.

Remarks
on the
different
kinds of
obliga-
tions.

The above divisions require, yet, some special remarks to illustrate them. We must therefore observe :

1. Although *natural obligations* give no right of action, yet they are so far of force that when the party under this obligation has made a voluntary payment, he cannot recover it back by any action.⁽¹⁾

2. Obligations are frequently made subject to some *condition* or *proviso* that is to depend on the contingency of some future event,⁽²⁾ which is uncertain whether it will happen or not ; provided, however, that it be possible, lawful, and not *contra bonos mores*,⁽³⁾ or irreconcilable with the nature of the transaction.⁽⁴⁾ Such obligations, however, are held as fulfilled when the event takes place, though it should happen after the death of the person in whose behalf the obligation has been entered into.⁽⁵⁾ When the condition is fixed for a limited time, within which it must be fulfilled, it is necessary that the

(1) L. 13. L. 64. ff. de cond. indeb.

(2) L. 100. ff. de verb. oblig. L. 37. L. 38. L. 39. ff. de reb. cred.

(3) L. 1. S. 11. L. 31. ff. de obl. et act. L. 7. ff. de verb. obl.

(4) L. 108. S. 1. ff. de verb. oblig.

(5) S. 5. Inst. de verb. oblig. Herein obligations differ from legacies. L. 59. ff. cond. et dem.

event take place within the time limited, otherwise it is held to have failed, and the obligation becomes void.—When the condition is *negative*, that is, provided such an event shall not take place, it is not held as fulfilled until it is become certain that this cannot happen, or when the time limited by the obligation is passed without this event having taken place. The condition is held as fulfilled when the party interested in the event of its not happening, is himself and purposely the cause of its not taking place.⁽¹⁾

Remarks
on the
different
kinds of
obligations.

When an obligation is dependant on several conditions, it is necessary that all be fulfilled.⁽²⁾

3. An obligation may be entered into either with the addition of the time of payment, or without it. When this is not inserted, the creditor may immediately demand payment; but when the time is fixed, he cannot make any demand till after it is expired.⁽³⁾ The limitation of the time of payment differs from a condition in this, that the condition suspends the obligation which arises out of the contract: the limitation of the time of payment, on the contrary, does not suspend the obligation, but only the time of exacting the fulfilment.⁽⁴⁾

(1) L. 85. S. 7. ff. de verb. oblig. L. 81. S. 1. ff. de cond. et dem. L. 39. ff. de Reg. Jur.

(2) L. 129. ff. de verb. oblig.

(3) S. 2. Inst. L. 41. S. 1. et 2. ff. de verb. oblig.

(4) L. 16. S. 1. ff. de compens.

Remarks
on the
different
kinds of
obliga-
tions.

As the fixing the time of payment is supposed to be added in favour of the debtor, he is at liberty to pay before the expiration of this time, and the creditor is bound to accept the payment, if the debtor insist on it,* provided it does not appear from the circumstances that this fixing of the time of payment was meant as well for the benefit of the creditor as the debtor.⁽¹⁾

As the limitation of the time of payment is founded on the confidence in the solvency of the debtor, it loses its force when the debtor becomes bankrupt, or the property pledged for security is sold by execution.⁽²⁾

4. When the agreement fixes a certain place for payment to be made, neither the creditor nor debtor can compel the other to pay or receive at any other place.⁽³⁾

5. When the obligation contains an engagement not yet *liquidated*, no execution can be had on it till it has been liquidated and determined, either by mutual agreement or judicial decree, as when a party has by agreement

(1) L. 70. ff. de solut. L. 17. ff. de Reg. Jur.

(2) Pothier, van. Contr. et Verbint. 1. D. pag. 240. et 241.

(3) Voet, ad tit. ff. de eo quod cert. loc.

* For example, in the case of Bills of Exchange, where the receiving the money at the stipulated *time* and *place* are of the essence of the contract.—T.

bound himself to make good all the damages and interest in any particular case, these must first be assessed and ascertained by previous taxation, and brought to a liquidated sum.

Remarks
on the
different
kinds of
obliga-
tions.

6. In alternative obligations, the debtor or obligor has the choice what to pay, or which condition to fulfil,⁽¹⁾ provided the contract does not give this choice to the creditor or obligee. The debtor, therefore, may choose which he will give of the things promised, but he cannot satisfy the condition by paying part in one and part in another, no more than the creditor, when the choice is in him, can demand to be paid in like manner.⁽²⁾

7. In general, when any one enters into an obligation for one and the same thing to different persons, or on the contrary, when different persons are jointly bound to another, each is only liable or entitled *pro rata* as debtor or creditor of the thing.

However, an obligation may be entered into, by which each party may be bound or entitled *in solidum*, when this is the object of the several parties, provided however that payment made to or by one of the parties, frees all the others. This is entitled an *obligation in solidum*,⁽³⁾ and, according to the general rule, has no place, but

(1) L. 25. ff. de contr. empt

(2) L. 8. S. 1. ff. de legat. 1.

(3) T. t. ff. de duob. reis const.

Remarks
on the
different
kinds of
obliga-
tions.

when expressly stipulated,⁽¹⁾ except in some few cases, as when the partners of any firm enter into any contract on account of their trade ;⁽²⁾ or when several persons are charged with one and the same guardianship,⁽³⁾ or when several persons have conspired together, and are equally principals in the commission of some crime, and are thus equally liable in damages,⁽⁴⁾ or have contracted together a debt *in solidum*, and are each liable for the whole with respect to the creditor, though among themselves the debt is divisible : thus with respect to the creditor, they have not⁽⁵⁾ the *beneficium divisionis*, or right to split the demand ; yet with respect to each other, when one has paid the whole, he is entitled to demand from the creditor a cession of his right of action against the other co-debtors, which he cannot refuse ; and in case he should be unable to give this cession of action, he would lose his right of suing *in solidum* any of the parties to the obligation.⁽⁶⁾

In case one of the debtors *in solidum* has paid the debt without taking a cession of action

(1) L. 9. pr. ff. d. t.

(2) V. D. Keessel. Thes. 702. 703. et 704.

(3) Voet, ad tit. ff. de magistr. conven. n. 6.

(4) L. 11. S. 2. ff. ad. Leg. Aquil. De Groot, Inl. 3. B. 34. D. S. 6.

(5) Neostadius, Dec. Cur. Holl. 49. V. D. Berg. Nederl. Adv. Boek. 3. D. Cons. 235. Bell. Jurid. Cas. 24.

(6) L. 47. ff. loc. cond.

against the co-obligors, he cannot afterwards obtain it from the creditor, since by payment the whole of the original debt and right of action thereon is extinguished;⁽¹⁾ but he is not, however, barred from recovering in his own name from each of his co-sureties their portion of the debt, as they are considered as co-debtors or partners with him who has paid the whole, or by their co-obligation *in solidum* as his guaranties.⁽²⁾

Remarks
on the
different
kinds of
obliga-
tions.

8. When an obligation is *divisible* each heir of the debtor is not further answerable than *pro rata* for the portion in respect to which he is heir;⁽³⁾ and each of them may satisfy his share of the obligation by paying to this amount; but if the obligation is *indivisible*, then each of the co-obligors is liable in the whole, although he has not bound himself *in solidum*,⁽⁴⁾ and each of the heirs of the obligee is entitled to demand the thing entire⁽⁵⁾ from the debtor; as on the other hand it may be demanded also from each of his heirs respectively.⁽⁶⁾

(1) L. 76. ff. de solut.

(2) Pothier, van Contr. et Verbinten. 1. D. pag. 297—302.

(3) L. 2. C. de hered. act.

(4) L. 192. ff. de Reg. Jur.

(5) L. 2. S. 2. ff. de verb. oblig.

(6) L. 11. S. 23. ff. de legat. 3. L. 2. S. 5. ff. de verb. oblig. The subject of the divisibility and indivisibility of contracts is expressly treated of by Pothier on Contracts and Oblig. 1 Vol. pag. 312—371.

Remarks
on the
different
kinds of
obliga-
tions.

9. In order to secure the fulfilment of an obligation, or to indemnify the obligee for non-performance, it is useful and customary to annex a *penalty* in case of default. When the principal obligation is extinguished the extinction of the penalty follows of course;⁽¹⁾ but on the other hand, the nullity of the penal clause does not induce that of the principal obligation.⁽²⁾ The penalty in case of non-performance of a condition, may, when it is excessive, be limited and diminished by the judge.⁽³⁾

A debtor, by satisfying with the consent of his creditor part of the obligation, is freed from the penalty as to that part.⁽⁴⁾

SECT. X.

Sureties.

In like manner, as for the further security of the creditor, he frequently takes a pledge or mortgage as real security;⁽⁵⁾ so, frequently for the same purpose, in addition to the principal obligation, he takes the personal and accessory obligation of a surety as a co-obligor.⁽⁶⁾

This kind of security is a contract whereby any one binds himself for a debtor, in behalf of

(1) L. 129. S. 1. ff. de Reg. Jur. L. 69. ff. de verb. oblig.

(2) L. 97. ff. de verb. oblig.

(3) Bynkershoek, Quæst. Jur. Priv. Lib. 2. Cap. 14.

(4) L. 9. S. 1. ff. si quis caut. in jud. See further on Penal obligations Pothier, d. l. pag. 372—415.

(5) See page 104. ante.

(6) Pr. Inst. de Fidejuss.

his creditor, to pay the whole or part of that in which he is indebted, and becomes a party to the obligation. Sureties.

From this, it follows :

1. That there can be no binding obligation on the part of the surety, unless there exist a legal binding obligation on the part of the principal debtor.⁽¹⁾

2. That the surety does not release the principal debtor from his obligation, but merely binds himself as a collateral security for the debt, wherein a surety differs from him who undertakes the debt of another.⁽²⁾

3. That a surety cannot effectually bind himself further than to the whole or part performance of the same thing to which the principal is bound.

4. That a surety cannot bind himself for more than the principal debtor is bound for (though he may for less), whether this excess respect the amount of the principal debt or the condition of the debt. And even should he do this, he would still be liable only to the extent of the principal obligation, and no further.⁽⁴⁾

(1) L. 178. ff. de Reg. Jur.

(2) He is termed an *Expromissor* in the Roman Law. L. 7. S. 8. ff. de dol. mal. J. Averanius, Interpr. Jur. Lib. 2. Cap. 15.

(3) L. 42. ff. de Fidejuss.

(4) This, from a principle of justice, is thus qualified in our law. See Voet, ad tit. ff. de Fidejuss. n. 4. V. D. Keessel,

Sureties.

5. That the cancelling of the principal obligation extinguishes also at the same time that of the surety ;⁽¹⁾ and that all grounds of defence on the part of the principal debtor against the creditor, as fraud or violence, are available also to the surety,⁽²⁾ unless this defence be confined to the person of the principal debtor, as when he has made a cession of his property, and is thus freed from any personal action till he is in better circumstances, in which case the surety remains liable.⁽³⁾

6. That the security is extinguished by the two characters of principal debtor and surety becoming united in the same person, as when the one becomes heir to the other.⁽⁴⁾

The obligation of surety arises either from special contract and agreement, or by virtue of law ; for example, in the latter case, that which a usufructuary is bound to pass for the restoration of the property in which he has a life interest ; or it arises by order of the judge,

Thes. 499. contrary to the doctrine of the Roman Law, according to which the obligation of a surety for a sum greater than the principal debt, was ipso facto void. C. F. Walchii, *Introd. in Controv. Jur. Civ.* Sect. 3. Cap. 4. Membr. 2. Subs. 2. S. 7. pag. 563. J. Averanii, *Interpr. Jur. Lib.* 2. Cap. 3.

(1) L. 4. C. de Fidejuss.

(2) L. 7. S. 1. L. 19. ff. de except.

(3) Pothier, *van Contr. en Verbinten*, 1. D. pag. 435—448.

(4) L. 93. S. 2. et fin. ff. de solut. L. 5. ff. de Fidejuss, L. 4. C. eod.

as when monies which have been deposited in court by one party, are taken out by the other on security Sureties.

Among those persons who are especially prohibited from becoming security for others, are females, whose engagements of this nature are rendered void by the law termed *Senatus Consult. Velleianum*,⁽¹⁾ even when they become sureties for their husbands.⁽²⁾ However, it is universally received in practice, that the woman may renounce this privilege.⁽³⁾

When the obligation of surety arises not from contract, but by operation of law, or by decree of the judge, the party must be a solvent person and within the jurisdiction of the place, either by person or property.⁽⁴⁾ This is termed a surety or bail which can be justified.

In case such surety afterwards becomes insolvent, the debtor is bound to provide another.⁽⁵⁾ We may become security for any debt, and to the behalf of any creditor whatsoever, without regard to the nature of the principal obligation,

(1) T. t. ff. et C. ad Sct. Vellej.

(2) Auth. si qua mulier C. eod.

(3) De Groot, Inl. 3. B. 3. D. S. 18. et 19. V. D. Keessel, Thes. 496.

(4) L. 2. ff. qui satisd. cog. .

(5) L. 10. S. 1. ff. qui satisd. cog. L. 4. ff. de stipul. Prætor.

Sureties. whatever it may be,⁽¹⁾ except it be invalid by law.⁽²⁾

We may also become security not only for the principal obligation, but also for a former surety which is termed *post* surety; and further, not only for an obligation already in *esse* but for one in *futuro*.⁽³⁾

A security may be entered into either before a judge or notary, or even by a private instrument, provided the intention of the party to bind himself as security clearly appears thereby; for to say that such a one is a good man, and one who, no doubt, will pay, does not amount to the obligation of a surety.⁽⁴⁾

In construing the words of a security bond, we must carefully attend to the extent of their signification;⁽⁵⁾ if they are general and unlimited, the surety is to be considered to have bound himself to all the obligations of the principal debtor arising from the original contract for which he has become security.⁽⁶⁾

(1) L. 1. L. 16. S. 3. ff. de Fidejuss.

(2) L. 16. S. 1. ff. ad Sct. Vellej. L. 14. C. eod. L. 70. S. ult. ff. de Fidejuss.

(3) L. 6. S. ult. ff. de Fidejuss.

(4) Voet, ad tit. ff. mand. n. 4.

(5) L. 68. S. 1. ff. de Fidejuss.

(6) L. 52. S. 2. ff. de Fidejuss. L. 2. S. 11. et 12. ff. de adm. rer. ad civit. pertin. L. 54. ff. locat.

However extensive and universal a security Sureties. may be, it cannot be extended beyond the obligations arising from the contract itself, or to any thing *dehors* the contract.⁽¹⁾

Securities are extinguished, and become void in the same way that other obligations do. A surety, however, is not released by the mere circumstance of the creditor having granted an indulgence in delay of payment to the principal debtor without the concurrence of the surety.⁽²⁾

Since, if he was unwilling to remain longer bound, he should have given notice to the creditor.⁽³⁾

By law there are various considerable privileges given to sureties:

1. *The beneficium ordinis seu excussionis*, whereby the surety may throw the creditor, when he demands payment, first upon the goods of the principal debtor.⁽⁴⁾ This privilege, however, is in general expressly renounced by the surety in the deed itself, and it is also held to be tacitly renounced when he constitutes himself surety *as principal*.⁽⁵⁾

2. The privilege of *division* (*beneficium divi-*

(1) L. 54. ff. de Fidejuss. L. 68. L. 73. ff. eod.

(2) See my Collection of Decisions, 1 D. Cas. 34.

(3) L. 38. ff. mand. L. 10. C. eod.

(4) Nov. 4. Cap. 1. Pothier, van Contr. et Verb. 1 D. pag. 481-494.

(5) Voet, ad tit. ff. de Fidejuss. n. 16.

Sureties. *sionis*), whereby, when several persons are security for the same debt, each of them may when sued for the whole amount, require the creditor to divide his claim, and bring his action also against the other co-sureties, each for his portion *pro rata*, in so far as the others are not insolvent.⁽¹⁾

This privilege also may be renounced in the act of security.

3. The privilege, on payment to the creditor of the principal debt, to demand from him cession of action, not only against the principal debtor, but also against all other persons who are liable,⁽²⁾ (*beneficium cedendarum actionum*).

After the surety has paid, in case he has obtained cession of action from the creditor, he may proceed against the debtor the same as the original creditor. If he neglects to take this cession of action, he has, nevertheless, at law, the right to proceed in his own name against the principal debtor to recover back what he has paid on his account.⁽³⁾ He has also the right, when there are co-sureties, to proceed against them to recover *pro rata*, their proportion of the whole debt paid by him.⁽⁴⁾

(1) S. 4. Inst. de Fidejuss. Pothier, d. l. pag. 494-506.

(2) L. 17. ff. de Fidejuss. L. 21. C. eod.

(3) Voet, ad tit. ff. de Fidejuss. n. 31. Pothier, d. l. pag. 508-521.

(4) Pothier, d. l. pag. 533-538.

CHAPTER XV.

On Obligations arising from Contracts and quasi Contracts.

SECT. I.

HAVING thus far shown the nature and different kinds and consequences of contracts in general, we must now treat of what more specially relates to each particular kind of contract or *quasi* contract from which an obligation arises.

1. We shall begin with *donation or gift*, which Donation. is an agreement, whereby any one through benevolence or generosity, gives or grants something irrevocably to another, who accepts it.⁽¹⁾

Very frequently, indeed almost always, such gifts have their origin in the principle of recompense or gratitude for former services:⁽²⁾ sometimes they are made in the contemplation of death, or of imminent danger; they are then termed *Donationes mortis causa*,⁽³⁾ otherwise they are termed *Donationes inter vivos*.

Every one who has the free disposal of his property may make a gift⁽⁴⁾ to any person, not

(1) T. t. Inst. D. et C. de donat.

(2) Voet, ad tit. ff. de donat. n. 3.

(3) T. t. ff. de mort. caus. don.

(4) L. 12. C. de donat. L. 21. C. mand.

Donation. prohibited by law from receiving it, thus a father may not give a donation to his son under age, who is yet under his parental power.⁽¹⁾ Nor husband and wife to each other, except so far as the donation is confirmed by death.⁽²⁾

No married woman without the consent of her husband, although the husband may without consent of the wife, unless, from the special circumstances, his object appears purposely to prejudice her.⁽³⁾

No minor to his guardian—no prodigal to his curator—no sick person to his physician ; particularly when those donations appear at all extravagant.⁽⁴⁾

Every thing that may be the subject of commerce, may be the subject of a donation.⁽⁵⁾ Not only part of any particular thing, but also the entire whole, as for example, an inheritance which has fallen to the donor.⁽⁶⁾ A donation however of our entire property, whereby we deprive ourselves of the power to make a will, is invalid in law.⁽⁷⁾

(1) De Groot, Inleid. 3 B. 2 D. S. 8. Voet, ad tit. ff. de donat. n. 6.

(2) T. t. ff. de donat. int. Vir. et ux.

(3) Voet, ad tit. ff. de rit. nupt. n. 54.

(4) Voet, ad tit. ff. de donat. n. 9.

(5) L. 14. C. de donat.

(6) L. 28. ff. eod.

(7) De Groot, Inleid. 3 B. 2 D. S. 11. Loenius, Decis. Cas. 123. V. D. Keessel. Thes. 487.

No donation is complete, until accepted by the donee ;⁽¹⁾ but it is immaterial whether this acceptance be signified by the deed itself, or by letter, or in any other way, provided the intention clearly appears.⁽²⁾ Donation.

The rule of the Roman law, that every donation above the value of 500 *aurei*, should be publicly registered, does not exactly prevail with us ;⁽³⁾ although with respect to the donation of immoveable property, it must be judicially transferred and made over, and the duty of two and half per cent. paid thereon.⁽⁴⁾ In like manner with respect to property which in case of intestacy would descend to collaterals, the same duty is paid if passed by a *Donatio inter vivos*.⁽⁵⁾

The effect of a valid donation, is that the donee has an action against the donor, to put him into possession of the thing given.⁽⁶⁾

That the property in the thing passes by delivery, without however subjecting the donor to warranty.⁽⁷⁾

That the donation by its nature is irrevoc-

(1) L. 10. ff. de donat.

(2) Voet, ad tit. ff. de donat. n. 12.

(3) De Groot, Inleid. 3 B. 2 D. S. 15.

(4) Ordonn. op den 4 Osten penn. of 9 May 1744.

(5) Ordonn. op't Collateraal of 11 March 1723, Art. 1.

(6) L. 35. C. de donat.

(7) Voet, ad tit. ff. de evict. n. 13.

Donation. cable.⁽¹⁾ This irrevocability is however subject to some exceptions.

1. On the ground of gross ingratitude or misbehaviour.⁽²⁾

2. When the donor of a gift of great value, afterwards has lawful children.⁽³⁾

3. When the donation is of such magnitude, that the children of the donor are thereby prejudiced in their legitimate portion;⁽⁴⁾ in which case however the gift is only held bad, in as far as regards the difference.⁽⁵⁾ When the donation is *Mortis causa* as it is termed, or under the apprehension of approaching death, it may at all times be reclaimed during the life of the donor.⁽⁶⁾

SECT. II.

Loan. Another kind of contract is that of *loan*, which is of different natures, according as it regards things, which do or do not perish by use: the first is properly termed *loan*, the other *commodate*.⁽⁷⁾

(1) L. 35. S. ult. C. de donat. L. 5. C. de revoc. donat.

(2) De Groot, Inleid. 3 B. 2 D. S. 17. Voet, ad tit. ff. de donat. n. 22-25.

(3) L. 8. C. de revoc. donat. Voet, ad tit. ff. de donat. n. 27. seqq.

(4) T. t. C. de inoff. donat.

(5) L. 7. C. de inoff. donat. De Groot, Inleid. 3 B. 2 D. S. 19. Voet, ad tit. ff. de donat. n. 37.

(6) S. 1. Inst. de donat.

(7) Mutuum. Commodum.

2. *Loan* is a contract whereby one of the parties gives over, or delivers to the other, the property or dominion of a certain sum of money, or quantity of things which perish by use;⁽¹⁾ who binds himself to return as much of the same kind or species.⁽²⁾

Lending of things which are consumed by use.

It is of the essence of this contract, First—That its subject matter be either a sum of money, or a quantity of a thing which perishes, or is consumed by use; for example, grain, oil, wine, fire, wood, &c.

Under this may be classed all such things, whose quantity is determined by weight, measure, or number.⁽³⁾

Secondly—That such money or other goods, must be given over by the lender to the borrower; for, without actual delivery this contract cannot exist.⁽⁴⁾

Thirdly—That the property in the thing lent passes to the borrower.⁽⁵⁾ Therefore the lender must be the proprietor or owner.⁽⁶⁾

Fourthly—That the borrower is bound to return so much of the like quantity, however the

(1) Res fungibiles.

(2) L. 2. ff. de reb. cred.

(3) D. L. 2. S. 1.

(4) Voet, ad tit. ff. de reb. cred. n. 4.

(5) D. L. 2. S. 2.

(6) D. L. 2. S. 4.

Lending of
things
which are
consumed
by use.

price of the thing may, in the mean time, have risen or fallen.⁽¹⁾

Fifthly—That both the contracting parties mutually agree, and are of accord in all these points.⁽²⁾

From this contract, which is *unilateral*, or only on one side, arises an action to the lender, or his heirs, against the borrower, or his heirs, to return a like sum of money, or quantity of the thing lent, and of the same quality;⁽³⁾ and this after the expiration of the time limited by the contract, or if no time has been fixed, then after a reasonable time to be determined by the judge.⁽⁴⁾

SECT. III.

Rent, or
interest.

In loans, especially of money, *interest* is very frequently stipulated, and here we must observe:

1. That this must not exceed *six per cent.*⁽⁵⁾ To stipulate for more is held usury, and is punishable.

2. That interest is sometimes payable without any covenant to that effect, on the ground of neglect, or delay in paying the principal.

When the payment of the debt is fixed at a

(1) Voet, d. t. n. 24. J. Averanius, Interpr. Jur. Lib. 3. Cap. 11 et 12.

(2) L. 18. S. 1. ff. eod.

(3) Voet, d. t. n. 15. seqq.

(4) Voet, d. t. n. 19.

(5) De Groot, Inleid. 3 B. 10 D. n. 29. Loenius, Decis. Cas. 21. Voet, ad tit. ff. de usur. n. 3 et 11.

day certain, then interest runs from that day, but if no day is fixed, then it runs from the day the lender brings his action at law.⁽¹⁾ This interest, however, unless otherwise stipulated, is not reckoned at more than 4 per cent.⁽²⁾

Rent, or
interest.

3. That the amount of interest may not exceed the principal.⁽³⁾

4. That interest upon interest is not allowed, nor to be turned into principal, so as to increase the original debt.⁽⁴⁾

SECT. IV.

When the loan is of such things as do not perish by use, it is termed *commodum* in the Roman law, which is a contract, whereby one party gratuitously delivers over to another, a certain thing to use or enjoy for a limited time, and the other party who receives it, binds himself to return it, after he has used or enjoyed it for the time agreed upon.⁽⁵⁾ It is of the essence of this contract,

Lending of
things
which are
not con-
sumed by
use.

1. That there be a certain thing lent, which may be any thing that is an object of traffic or commerce, particularly moveable property; for instance, a carriage, a horse, a book, &c.,

(1) Voet, d. n. 11.

(2) Zurck, Voce Renten, S. 1. n. 3.

(3) Voet, ad d. t. n. 19.

(4) L. 28. C. de usur. Voet, ad. d. t. n. 20.

(5) T. t. ff. et C. commod.

Lending of things which are not consumed by use.

but sometimes also immoveable property may be the subject of this contract; thus I may lend to my friend a cellar, or loft, or chamber in my house, &c.⁽¹⁾

Things which are not allowed to be sold, are also forbidden by law to be lent, such as prohibited books, &c.;⁽²⁾ things which consume or perish by use, are also incompatible with the nature of this contract, unless they are lent merely to serve as ornament or show.⁽³⁾

2. That the thing being lent only for a certain defined use, it must be strictly observed, or the party is guilty of a species of theft.⁽⁴⁾

The party also who borrows the thing, is bound to take all possible care for its preservation;⁽⁵⁾ all negligence in this respect subjects him to damages,⁽⁶⁾ and nothing can excuse him therefrom but irresistible violence, or unavoidable misfortune.⁽⁷⁾

3. That the use be given *gratuitously*, otherwise it is not *commodum*, but *hiring*, or *letting*.⁽⁸⁾

4. That the same thing which is lent be re-

(1) L. 1. S. 1. ff. d. t.

(2) L. 6. C. de pact.

(3) L. 3. S. ult. L. 4. ff. commod.

(4) L. 5. S. 8. ff. eod. L. 1. S. ult. L. 40. ff. de furt.

(5) L. 1. S. 4. ff. de obl. et act. L. 5. S. 2 ff. commod.

(6) L. 20. L. 21. S. 1. ff. commod.

(7) L. 5. S. 4. ff. commod. L. 1. S. 4. ff. de obl. et act.

(8) S. 2. in fin. Inst. quib. mod. re contr. obl. L. 59. S. 3. ff. de præscr. Verb.

turned, and in the same state;⁽¹⁾ and this after the expiration of the time limited, or of such a time as is requisite for the use, to be defined by the judge, when necessary.⁽²⁾

Lending of things which are not consumed by use.

Sometimes the lending is simply until the owner require it back.⁽³⁾

From this contract arises two actions: the first,⁽⁴⁾ is given to the lender, against the borrower, and his heirs, to return the thing lent, or the value of it, in case it has become impossible, by his fault; further for compensation in damages occasioned by the destruction of the thing, or by not returning it in time; and finally for the delivery of all the fruits of the thing, produced by it in the meantime.⁽⁵⁾

The other action lies for the borrower against the lender,⁽⁶⁾ for damages; as in case the thing lent had some vice or defect, known to the lender, which has occasioned damage to the borrower, or when he has been put to extraordinary cost and charges on account of the thing lent, or when the lender, or some one on his part has impeded him in the free use of the thing.⁽⁷⁾

(1) L. 3. S. 1. L. 19. ff. commod.

(2) L. 5. pr. L. 17. S. 3. ff. eod.

(3) L. 1. ff. de precar.

(4) Actio commodati directa.

(5) Voet, ad tit. ff. commod. n. 2-7.

(6) Actio commodati contraria.

(7) Voet, ad d. t. n. 8. seqq.

SECT. V.

Deposit, or
Bailment.

Deposit⁽¹⁾ is a contract whereby one person commits something to the care of another, who charges himself gratuitously with the care of it under the obligation to restore it when demanded.⁽²⁾

The thing deposited must be of a *corporeal* and *moveable* nature, as this contract is not applicable to *immoveable* property, which cannot be removed from its place, and is, therefore, always to be found. Thus, for example, when on going abroad, we give the key of our house to a friend, this is a mere deposit of the key and of the furniture in the house to which access is had by this means, and not of the house itself.⁽³⁾ The nature of this contract requires, first, a delivery of the thing given in deposit.

2. That the thing must be given with this object of being kept in deposit: if given with any other object, it is another sort of contract.⁽⁴⁾

3. That the deposit be undertaken *gratuitously*, for if any recompense be stipulated for the care, it becomes a contract of hire.⁽⁵⁾

(1) Depositum.

(2) T. t. ff. et C. depos.

(3) Pothier, Traité du Contrat de Depot, Chap. 1. Art. 1. S.

(4) L. 8. ff. mand. L. 1. S. 12 et 13. ff. depos.

(5) L. 1. S. 8. ff. depos.

4. That the contracting parties be perfectly agreed, and mutually understand each other, whether the agreement be declared verbally or by writing, expressly or tacitly.⁽¹⁾

Deposit, or
Bailment.

Two actions also arise from this contract; the first⁽²⁾ lies for the party who has given the thing in deposit, against the party who has received it, or his heirs, to compel a return of the deposit, or for compensation for the damage occasioned to the thing by his fault or neglect.⁽³⁾ The other action⁽⁴⁾ is given to him who has received the thing in deposit against the party who has given it, or his heirs, for indemnification; as, for instance, of all costs and charges that he has been put to for the preservation of the thing; and further, for indemnification of all the damage occasioned by the thing without any fault on his part.⁽⁵⁾ For obtaining of which he has the right to retain the thing until he is satisfied.⁽⁶⁾

SECT. VI.

With the contract of deposit those of *sequestration* and *consignation* have great affinity.⁽⁷⁾

Sequestra-
tion and
Consigna-
tion.

(1) L. 1. S. 8. ff. naut. camp. stabul.

(2) Actio depositi directa.

(3) Voet, ad tit. ff. depos. n. 4-9.

(4) Actio depositi contraria.

(5) Voet, ad d. t. n. 10.

(6) Leyser, Medit. ad ff. Tom. 3. Spec. 176. Medit. 2 et 3.

(7) Pothier, Traité du Contrat de Dépôt, Chap. 4.

Sequestration and Consignation.

Sequestration is the keeping of any goods concerning which there is any dispute, in the hands of a third person, either by agreement or by decree of the judge, in order that when the dispute is terminated, the goods may be given over to the party who shall be declared entitled thereto.⁽¹⁾

A Judicial Sequestration, is when a person is placed, by order of the judge, over goods taken in arrest; it takes place also when an estate or inheritance, on account of debts, is abandoned by the heir to the creditors; or when an inheritance is left, the heirs whereof are unknown.

Consignation consists in the receiving and taking charge of money when the person really entitled to it is not yet ascertained.⁽²⁾

It is also used when a debtor does not chuse to remain charged with money which his creditor will not or cannot receive, because an arrest has been laid on it, in the hands of the debtor, by a third person.

It is the practice also to bring into consignation or court, the monies produced by executorial sale of any immoveable property which cannot be paid out until the several claims for preference thereon are decided.

(1) L. 110. ff. de Verb. sign. L. 17. ff. depos. L. 5. C. eod.

(2) Voet, ad tit. ff. de solut. n. 29.

SECT. VII.

5. Although the right which a creditor has Pledge. upon the goods which are put into his possession by his debtor, for greater security of his debt, comes properly under the head of real rights,⁽¹⁾ yet the agreement itself by which this pledge is given, is of that nature that it induces personal actions and obligations.⁽²⁾ The first⁽³⁾ of these actions lies for the debtor who has paid the entire debt and interest,⁽⁴⁾ against the creditor, for restitution of the thing pledged, or its value in case it has been lost by the creditor's neglect; and further, for compensation for the damage occasioned to the thing through the creditor's want of care; and finally, to deliver over, or account for all the fruits arising from the thing pledged, unless by the contract it was stipulated⁽⁵⁾ that the creditor should enjoy these instead of interest.

It is evident that when the creditor has sold the pledge in default of payment, this action to recover it no longer lies, but only an action of account for what it has been sold for, and to pay over the surplus to the debtor.⁽⁶⁾

(1) See Chapter XII. page 173, *supra* et seqq.

(2) T. t. ff. de pignor. act.

(3) Actio pignoratitia directa.

(4) L. 9. S. 3. ff. de pign. act.

(5) Pactum antichresticum.

(6) Voet, ad tit. ff. de pign. act. n. 2-9.

Pledge.

The other action⁽¹⁾ lies for the creditor against the debtor for indemnification, as when he has given him, as security, a thing that does not belong to him, or was previously pledged to another, or which through some intrinsic defect is not of sufficient value, and therefore does not answer the purpose of security. So also when the creditor has been at costs and charges necessary for the preservation of the thing.⁽²⁾

SECT. VIII.

Purchase
and sale.

6. Of all the various dealings of men with each other in society, none is more frequent than that of *Purchase and Sale*. By this is understood the agreement of one person to make over to another a certain thing for a certain fixed price.⁽³⁾

There are, therefore, three things essential to the contract of sale. The *thing* to be sold ; a *price* to be agreed on ; and the *mutual consent* of the parties.

There must be a certain thing in existence to be sold. This is the essence of the contract: for where the thing about which the agreement is to be made, has never existed or exists no

(1) Actio pignoratitia contraria.

(2) Voet, ad d. t. n. 10.

(3) L. 5. S. 1. ff. de præscr. Verb. De Groot, Inleid. 3 B. 14 D. S. 1.

longer, there can be no sale.⁽¹⁾ However, things *in futuro* may be sold, as this coming year's crop.⁽²⁾ We may even sell the hope or *expectancy* in such case ; thus, although there may be a total failure of the crop this year, yet the purchase money is nevertheless due : on the other hand, should the value of the crop exceed the purchase money six-fold, yet the purchaser is entitled to the whole.⁽³⁾

Purchase
and sale. ;

No person can purchase that which already is his own ;⁽⁴⁾ but *yet* he may purchase the property in a thing of which he has only the use,⁽⁵⁾ or which he enjoys in common with another, to wit, as joint-tenant.⁽⁶⁾

The second essential requisite in a sale, is the *price*.⁽⁷⁾ This can only consist of money,⁽⁸⁾ since the giving of any thing else is not sale, but *exchange* or *barter*.⁽⁹⁾ This price must be *real*, and not imaginary or pretended, otherwise the

(1) L. 1. L. 7. ff. de her. vel act. vend. L. 15. pr. L. 57. pr. S. 1. et 3. ff. de contr. empt.

(2) L. 8. pr. L. 78. S. 3. ff. de contr. empt. L. 25. ff. de act. empt.

(3) L. 8. S. 1. L. 11. S. ult. L. 12. ff. de act. empt.

(4) L. 16. pr. L. 39. ff. L. 4. L. 10. C. de contr. empt.

(5) L. 16. S. 1. ff. eod.

(6) L. 18. pr. ff. eod.

(7) L. 72. pr. ff. eod.

(8) S. 2. Inst. de empt. vend.

(9) D. S. 2. L. 1. pr. et S. 1. ff. de contr. empt.

Purchase
and sale.

transaction is a *donation*.⁽¹⁾ The price must also be *defined*, either directly or by reference to something else ; as, for instance, when I sell you my land for the same price per acre, as Peter sold his.⁽²⁾

The price also may be left to be determined by a third person ; but not to one of the contracting parties.⁽³⁾

A principal and essential requisite in this contract is the mutual consent of the parties.⁽⁴⁾

Since no one against his will is constrained to sell,⁽⁵⁾ except in cases wherein the state deems it necessary to purchase the property of any individual for the public use, in which case he is obliged to part with it on a reasonable compensation.⁽⁶⁾

This consent must be free and unrestrained, without the operation of fraud, error, or fear, on either of the parties.⁽⁷⁾

Every thing which may be an object of commerce is saleable.⁽⁸⁾ Among those things prohibited, are such as are consecrated to sacred

(1) L. 21. C. de transact. L. 3. L. 9. C. de contr. empt.

(2) L. 7. S. ult. L. 37. ff. de contr. empt.

(3) L. 35. S. 1. ff. L. ult. C. eod.

(4) L. 1. S. ult. L. 2. C. eod. L. 55. ff. de obl. et act.

(5) L. 71. ff. L. 11. L. 13. L. 14. C. eod.

(6) See ante pag. 122.

(7) See ante pag. 188-190.

(8) L. 6. pr. L. 34. S. 1. ff. de contr. empt.

uses, or to the service of the state.⁽¹⁾ Things also of which the alienation is prohibited by the last will of the owner.⁽²⁾ Stolen goods;⁽³⁾—contraband of war, and which, as such, it is unlawful to sell to the enemy.⁽⁴⁾

Purchase
and sale.

To sell machinery or tools appertaining to manufactories if intended for exportation.⁽⁵⁾

Houses for the purpose of being pulled down without previous permission.⁽⁶⁾

Small, or pedlar's wares, or merchandize, for the purpose of huckstering.⁽⁷⁾ We cannot sell the property of another;⁽⁸⁾ but if the seller has thereby willingly or wittingly deceived an ignorant purchaser, he is liable in damages.⁽⁹⁾

The contract of sale is held as complete so soon as both parties are agreed as to the thing to be sold, on what terms or conditions, the

(1) L. 6. pr. L. 22. L. 23. L. 24. L. 51. L. 62. S. 1. ff. eod.

(2) L. ult. S. 2. et 3. C. comm. de legat.

(3) L. 34. S. 3. ff. de contr. empt.

(4) Voet, ad tit. ff. de contr. empt. n. 18.

(5) Plac. Gener. 17th April, 1624. G. P. B. 1 D. pag. 1164.
Plac. Gener. 17th October, 1753. G. P. B. 8 D. pag. 1281.
Plac. Gener. 18th June, 1755. ibid. pag. 1286. Plac. Gener.
31st January, 1776. G. P. B. 9. D. pag. 1345.

(6) Public. Holl. 23 June, 1797.

(7) Plac. Holl. 12th April, 1749. Publ. 12th August, 1802.

(8) L. 1. C. de comm. rer. alienat. t. t. C. de reb. al. non alien.

(9) L. 30. S. 1. ff. de act. empt.

Purchase
and sale.

quantity and the price.⁽¹⁾ To the completion of the contract, nothing further is necessary than mutual consent, neither the delivery of the goods,⁽²⁾ nor the payment of the purchase money,⁽³⁾ nor an instrument, or bill of sale in writing, unless the latter was expressly agreed.⁽⁴⁾ A conditional sale is not perfect until the condition takes place.⁽⁵⁾

In things sold by measure, weight, or number, the sale is not complete until this has taken place.⁽⁶⁾

SECT. IX.

Conse-
quences of
purchase
and sale.

The consequences of purchase and sale are different with respect to the buyer and seller.

Before delivery, although the sale is complete by mutual consent, the right of property remains in the seller,⁽⁷⁾ and the buyer and seller have against each other, only a personal action for the fulfilment of the contract.

(1) L. 8. pr. ff. de per. et comm. rei vend. L. 1. S. ult. ff. de contr. empt.

(2) L. 1. S. 2. ff. de rer. perm.

(3) L. 2. S. 1. ff. L. 9. C. de contr. empt.

(4) Pr. Inst. de empt. et vend. L. 10. L. 17. C. de fid. Inst.

(5) L. 7. pr. et S. 1. L. 81. pr. ff. de contr. empt. L. 43. S. 9. ff. de cædil. edict.

(6) L. 35. S. 5, 6, et 7. ff. de contr. empt. L. 2. C. de per. et comm. rei vend.

(7) L. 8. L. 11. C. de act. empt.

The first⁽¹⁾ of these actions lies for the purchaser and his heirs, against the seller and his heirs ; the other,⁽²⁾ for the seller and his heirs against the purchaser and his heirs.⁽³⁾

Consequences of purchase and sale.

The seller is bound to deliver the goods sold to the purchaser, and to put him into possession of them,⁽⁴⁾ and this directly, or at the time limited by the contract.⁽⁵⁾

In case this delivery is not made at the time stipulated, he is liable in damages.⁽⁶⁾

So also with the goods, he must give up all that appertains thereto ; for example, with a house all its fixture.⁽⁷⁾ In case the goods sold have any substantial defect, or are burdened with any secret incumbrance, he is bound to reduce the price accordingly, or even to cancel the sale, if he has purposely misled the buyer.⁽⁸⁾

The chief obligation of the buyer is to pay the purchase money,⁽⁹⁾ with interest from the time

(1) Actio empti.

(2) Actio venditi.

(3) T. t. ff. de act. empt.

(4) L. 8. C. de act. empt.

(5) L. 14. ff. de Reg. Jur. L. 10. C. de act. empt.

(6) L. 1. pr. L. 3. S. 1. L. 11. S. 9. L. 12. ff. L. 4. L. 22. C. eod.

(7) De Groot, Inleid. 3 B. 14 D. S. 22. n. 50.

(8) T. t. ff. de œdil. edict.—This action is termed actio redhibitoria, et quanti minoris.

(9) L. 13. S. 20. ff. L. 6. L. 13. C. de act. empt.

Conse-
quences of
purchase
and sale.

he is *in mora*, or default :⁽¹⁾ also to reimburse to the seller the costs he has been at, with respect to the thing sold, after the sale.⁽²⁾

In the purchase and sale of an inheritance, it is not so much the particular and special parts of it, as the entire right of the seller to the whole in general as it existed at the time of the sale, that is transferred to the purchaser ;⁽³⁾ while the purchaser, besides the payment of the purchase money, is bound to save the seller harmless from all claims and demands of the creditors of the estate, who, notwithstanding the sale, have still their right of action against the seller.*⁽⁴⁾

When we sell a debt, or right of action, or claim against a third person, we are bound to give him an assignment or *cession of action*, and *procuracion in rem suam*, or an irrevocable power of attorney, to sue in our name for his own benefit.⁽⁵⁾

(1) L. 19. ff. de per. et comm. rei. vend. L. 13. L. 15. C. de act. empt.

(2) L. 13. S. 22. L. 38. S. 1. ff. de act. empt.

(3) L. 2. S. 1. ff. de her. vel. act. vend.

(4) L. 2. C. eod. L. 2. C. de legat. Sande, Decis. Lib. 3. tit. 4. def. 3.

(5) Voet, ad tit. ff. de her. vel. act. vend. n. 9. et seqq.

* This is to be understood of the case in which the heir having entered on the inheritance, whereby, under the Dutch law, he becomes liable for all the debts of the ancestor, afterwards sells it to a third person, with all its incumbrances.—T.

Sometimes the respective obligations of the buyer and seller undergo some variations in consequence of particular conditions annexed to the contract,⁽¹⁾ which give it a more special nature, so far, as these conditions are not improper and repugnant to the nature and essence of the contract itself.⁽²⁾ As every thing that happens to the goods in question before the sale, is to the profit and loss of the seller,⁽³⁾ so in like manner whatever happens after that the sale, by mutual agreement of the parties is perfect, falls to the profit or loss of the buyer;⁽⁴⁾ although the goods themselves may not yet have been delivered.⁽⁵⁾ This, however, is subject to some exceptions:

Consequences of purchase and sale.

1. In the sale of things which must first be weighed, measured, or counted.⁽⁶⁾

2. When by neglect, or fault of the seller, some damage has happened to the thing sold.⁽⁷⁾

(1) L. 41. pr. ff. de contr. empt. L. 14. C. de resc. vend. L. 48. ff. de pact. L. 8. C. de pact. int. empt. et vend.

(2) L. 13. S. 26. ff. de act. empt. L. 42. L. 52. ff. de contr. empt.

(3) L. 44. L. 57. L. 58. ff. de contr. empt.

(4) S. 3. Inst. de empt. et vend. t. t. ff. et C. de per. et comm. rei vend. De Groot, Inleid. 3 B. 14 D. S. 34.

(5) L. 62. S. 2. ff. de contr. empt. L. 30. pr. ff. de act. empt. L. 4. L. ult. C. de per. et comm. rei vend.

(6) L. 1. S. 1. L. 5. L. 15. ff. de per. et comm. rei vend.

(7) L. 14. pr. ff. L. 4. L. 6. C. eod. L. 35. S. 4. ff. de contr. empt. L. 36. L. 54. pr. ff. de act. empt.

Conse-
quences of
purchase
and sale.

3. When the damage is occasioned by some defect in the thing, which existed before the sale.⁽¹⁾

4. When a special condition has been inserted in the contract, respecting the profit and loss.⁽²⁾

SECT. X.

How the
sale is
annulled.

Purchase and sale having once taken place, they are cancelled in different ways :

1. When the buyer and seller release each other by mutual consent,⁽³⁾ though if delivery had actually been made of the thing sold, it would then be a new contract of sale ; and thus in case of the property being of an immoveable nature, the duty to Government of two and a half per cent. must again be paid.⁽⁴⁾

2. When the thing sold has such a defect that if the buyer had known of it, he would have refrained from purchasing.⁽⁵⁾

3. When the buyer or seller has been prejudiced in more than the half in respect of the

(1) L. 15. ff. L. 6. C. de per. et comm. rei vend.

(2) S. 3. Inst. de empt. et vend. L. 1. pr. ff. de per. et comm. rei vend. L. 35. S. 4. ff. de contr. empt.

(3) L. 35. ff. de Reg. Jur. L. 5. S. 1. ff. de resc. vend.

(4) L. 58. in fin. ff. de pact. Ordonn. op den 40 sten penning van. 9. May 1744. Art. 7.

(5) T. t. ff. de œdil. edict. De Groot, Inleid. 3 B. 17 D. S. 4.

purchase money;⁽¹⁾ that is, if a thing worth 100 guilders has been sold for 45, or on the contrary, any thing worth 45 sold for 100.⁽²⁾ However the annulling of the contract on this head is not permitted, when the other party is prepared to increase or reduce the price of the thing to its true value.⁽³⁾

Here the
sale is
annulled.

4. When any thing is sold for ready money and payment does not follow, the seller is at liberty to reclaim the goods, and so annul the contract.⁽⁴⁾

5. When the goods are sold on this footing, that the sale shall be considered as void, if within a certain limited time a higher offer is obtained, or if within a fixed time the purchase money is not paid;⁽⁵⁾ and

6. When afterwards any one comes forward and shows a right of property, or other real right in the thing sold.⁽⁶⁾ In this case the seller must guarantee the thing sold,⁽⁷⁾ and so take up the cause for the buyer; and if the thing is adjudged to the claimant, the seller must refund to the buyer the purchase money, with

(1) L. 2. L. 8. C. de resc. vend. De Groot, Inleid. 3 B. 17 D. S. 5. et 52 D.

(2) J. Averanius, Interpr. Jur. Lib. 3. Cap. 7.

(3) D. L. 2. C. de resc. vend.

(4) See page 120 supra.

(5) T. t. ff. de in diem addict.—t. t. ff. de leg. commiss.

(6) T. t. ff. et C. de eviction.

(7) De Groot, Inleid. 3 B. 14 D. S. 6.

How the
sale is
annulled.

interest, and indemnify him for all costs and damages.⁽¹⁾

SECT. XI.

Letting
and hiring.

7. Between the contract of purchase and sale, and that of *letting and hiring*, there is a very close relation. By this latter contract we understand that kind of agreement whereby the one party binds himself to suffer another to have the use of a certain thing, during a fixed and limited time, in consideration of a certain sum of money, as hire or rent, which the other binds himself to pay.⁽²⁾

The requisites essential to this contract are :

1. A thing capable of being let on hire, whether moveable or immoveable, corporeal or incorporeal, as the farming of tolls and duties. The hirer or lessee must be assured of a certain use or enjoyment, which is usually limited by a clause in the lease ; for instance, land which is let as pasture, may not be ploughed or sowed.⁽³⁾ The use of the thing is not unlimited, but only for a certain time. When this time exceeds twenty-five years, the

(1) L. 8. L. 51. S. 3. L. 60. L. 66. S. ult. L. 70. ff. L. 9. L. 16. L. 17. L. 21. L. 23. L. 25. C. de evict.

(2) T. t. ff. et C. locat. cond.

(3) De Groot, Inleid. 3 B. 19 D. S. 14, and Groenewegen's notes there.

indenture of lease must be a judicial act, and the government duty of two and a half per cent paid on it.⁽¹⁾

Letting
and hiring.

2. A definite rent or hire, payable generally in money :⁽²⁾ although sometimes part of the rent is paid in produce.⁽³⁾

3. The mutual consent of the hirer and letter, or lessor and lessee ;⁽⁴⁾ in the letting of houses⁽⁵⁾ and lands,⁽⁶⁾ as it is necessary that the consent appear in writing, a lease on a proper stamp is necessary.

SECT. XII.

From the contract of letting and hiring, the following obligations arise :

Conse-
quences of
hiring and
letting.

1. On the side of the lessor, to give to the lessee possession of the thing let, at the time fixed, in order that he may have the use of it.⁽⁷⁾ For this purpose the lessee has an action against the lessor,⁽⁸⁾ which also extends to damages,

(1) Plac. op den 40 sten penning of 9 May 1744. Art. 9. et 19.

(2) S. 2. Inst de loc. cond.

(3) L. 19. S. 3. ff. loc. cond. L. 18. L. 21. C. eod.

(4) L. 1. L. 2. ff. eod.

(5) Ord. Van't Zegel of 11 Sept. 1794. Art. 61.

(6) Plac. van Keizer Karel of 22 Jan. 1515. Pol. Ordonn. Art. 31. Plac. 26. Septemb. 1658. et 24 Feb. 1696.

(7) L. 9. pr. ff. loc. cond.

(8) Actio conducti.

Conse-
quences of
hiring and
letting.

when the thing let is, by the lessor's fault or neglect, not put into the possession of the lessee.⁽¹⁾

2. To the lessee for quiet enjoyment of the thing let, both on the part of the lessor and others.⁽²⁾

3. To maintain and keep the thing let in a proper state, so that the lessee may have the due enjoyment of it.⁽³⁾

4. To indemnify the lessee for all damages occasioned by any material defect in the thing let.⁽⁴⁾

5. For performance of the particular covenants in the lease.⁽⁵⁾

On the other hand the obligations of the lessee, consist :

1. In the punctual payment of the rent, according to the covenant in that behalf when fixed, and if not, then according to the custom of the place ;⁽⁶⁾ but the lessee is entitled to demand the entire remission of this rent, or an abatement of part, accordingly as he has had no use of the thing let, during the whole or part of

(1) L. 7. L. 8. L. 9. pr. ff. d. t.

(2) L. 33. L. 34. L. 35. ff. d. t.

(3) L. 30. pr. ff. eod.

(4) L. 19. S. 1. ff. eod.

(5) L. 23. ff. de Reg. Jur.

(6) L. 17. C. de loc. cond. L. 1. S. 4. ff. de migr. L. 34. ff. de Reg. Jur.

the time of the lease,⁽¹⁾ unless this had been occasioned by his own act.⁽²⁾

Consequences of hiring and letting.

To this head also appertains the case when through inundation, tempest, or such like unavoidable misfortunes, the land has produced nothing.⁽³⁾

2. The lessee is bound to use the thing let, for no other purpose than that for which it was let to him.⁽⁴⁾

3. To take care that the thing is kept in a proper state and be not misused.

4. At the expiration of the lease, to return the thing undamaged to the lessor.⁽⁵⁾

5. To perform the particular covenants to which he is bound either by the law, or the custom of the place, or by the indenture of lease itself, for all which an action lies for the lessor against the lessee.⁽⁶⁾

Among the special consequences of this contract, is the *lien* which the lessor or landlord has upon the crop produced from the land, and on the moveable property brought on the premises, for his arrears of rent; for which the law gives him the privilege of a legal and preferent

(1) L. 24. S. 4. ff. loc. cond.

(2) L. 155. pr. L. 203. ff. de Reg. Jur.

(3) A. Van Wezel, Tract. de remiss. merced. Voet, ad tit. ff. locat n. 24. et 25.

(4) L. 3. C. de loc. cond.

(5) L. 48. S. 1. ff. L. 32. L. pen. C. eod.

(6) Actio locati.

Conse-
quences of
hiring and
letting.

mortgage,⁽¹⁾ whereof also he may avail himself by *Arrest* or *Distress*.

The term for which any thing is hired ceases or stops,

1. When the term of the lease expires.

2. When the thing let, is by unforeseen misfortune destroyed ; as, for example, when a house is burnt.⁽²⁾

3. By *Merger*, when the lessee succeeds to the inheritance of the lessor.⁽³⁾

4. When the lessor himself has an absolute necessity for the thing.^{(4)*}

5. Although the hire or rent, does not cease by the death of the lessee,⁽⁵⁾ yet in the case of insolvency, it does not go beyond the first coming usual period of removing or giving up the occupancy.⁽⁶⁾

6. By sale of the thing let, the lease does not become void ; according to the rule which prevails with us, *hire goes before sale*.⁽⁷⁾

(1) See supra pag. 174 et 178.

(2) L. 9. S. 1. ff. loc. cond.

(3) L. 75. L. 95. S. 2. ff. de solut.

(4) L. 3. C. de loc. cond.

(5) S. ult. Inst. L. 19. S. 8. ff. L. 10. C. loc. cond.

(6) V. D. Keessel, Thes. 676.

(7) De Groot, Inleid. 3 B. 19. D. n. 59.

* This doctrine may seem rather strange, but the reader will find that it is supported by the text of the Roman law referred to. See also Voet ad ff. lib. 6. t. 3. n. 48, et L. 13, t. 5. n. 9.

The contract of hiring and letting is not confined merely to corporeal things, but is frequently extended to work and labour; for example, when I give my silver to a silversmith, to make me thereout a pair of candlesticks, or my cloth to a tailor, to make me a coat, this is a contract, by which on his part he hires his labour to me at a certain price.⁽¹⁾ To this especially pertains the hire of servants, against whose misconduct various provisions have been made by the local ordinances of most towns.⁽²⁾

Consequences of hiring and letting.

SECT. XIII.

8. The contract termed with us *Erfpagt gunning*, has a great resemblance to that of sale, and also to that of hire. It takes place when any one grants to another an estate of inheritance in certain lands, on paying yearly some quit-rent, or offering, in acknowledgment of the original title of the grantor, and this right reserved to the grantor, as an imperfect species of property, is of a *real nature*,⁽³⁾ but the contract whereby this right is granted induces personal obligations.

The grantee of the land, is entitled to enjoy

(1) S. 4. Inst. de loc. cond.

(2) De Groot, Inleid. 3 B. 19 D. S. 13. V. D. Keessel, Thea. 679.

(3) Voet, ad tit. ff. si ager vectig. n. 4.

Conse-
quences of
hiring and
letting.

its fruits in the same manner as a usufructuary, and therefore is subject to all its charges.⁽¹⁾

The grantor of the land is entitled to demand, yearly, the quit-rent which has been reserved in the grant, as an acknowledgment of his ancient title, and the holding under him as lord,⁽²⁾ and if the grantee be three years in default, it works a forfeiture to the lord.⁽³⁾

Here we ought perhaps to notice the contract of *society* or partnership, but as we have destined the last book of this work, wherein to treat on all that particularly relates to commerce, we must refer the reader thereto, where we shall also treat of bills of exchange, charter parties, bottomry, and subjects of the like nature.

SECT. XIV.

Mandate.

9. The contract of *mandate*, is of frequent occurrence in society. By this contract we understand the case when one man commits to another the care and management of one or more of his affairs for his account, and in his stead, who charges himself therewith gratuitously, and binds himself duly to account and

(1) Voet, ad d. t. n. 11 et 12.

(2) L. 2. C. de jur. emphijt.

(3) De Groot, Inleid. 2 B. 40 D. S. 19. Regtsgel Observ. 4 D. Obs. 31. V. D. Keessel, Thes. 383.

answer.⁽¹⁾ The essential requisites of this con- Mandate.
tract are :

1. That there be a thing to be done or executed,⁽²⁾ not contrary to the law or *contra bonos mores*,⁽³⁾ nor altogether of such an indefinite nature as to be quite uncertain, nor of such a nature as to render it unfit to be executed by the principal himself;⁽⁴⁾ and further, that it be of such a nature, as not to be unfit to be executed by such a person as he who is charged with it; and that the mandator or principal, or some third person, have some interest in it.⁽⁵⁾

2. That it is the intention of the *mandator and mandatory*, or of the person who gives, and of him who accepts the charge, to bind each other reciprocally, without regard to the way in which the agreement is made, whether verbally, by letter, or regular power of attorney.⁽⁶⁾

Here a clear distinction must be made between *mandate*, and *simple recommendation or advice* to do a thing, which latter raises no obligation unless coupled with fraud.⁽⁷⁾

3. That the business undertaken be done *gra-*

(1) T. t. Inst. 1. ff. et C. mand.

(2) L. 12. S. 14. ff. mand.

(3) L. 6. S. 3. L. 12. S. 11. ff. eod.

(4) L. 10. S. 4. ff. eod.

(5) L. 2. L. 6. S. 4. ff. eod.

(6) L. 15. S. 2. ff. eod.

(7) L. 2. S. 6. L. 20. ff. eod. L. 47. ff. de Reg. Jur.

Mandate. *tuitously*, otherwise it is a contract of hire of service.⁽¹⁾ However it is not contrary to the nature of mandate, for the mandatory to receive some recompense or honorary remuneration for his service.⁽²⁾

The obligations of the mandatory are, to accomplish and bring to a conclusion the business which he has voluntarily taken upon him :⁽³⁾

In the execution of it, to use all possible care :⁽⁴⁾

To duly account with the mandator, and to give over to him, all that has come to his hands on account of the thing wherewith he is charged.⁽⁵⁾

The obligations of the mandator, on the other hand, are to save the mandatory harmless, and reimburse him all the costs he has been put to on account of the charge ; provided these costs have not been occasioned by his own fault, or negligence ;⁽⁶⁾ and to guarantee him against all obligations and engagements, which he has been obliged to enter into on account of the charge,⁽⁷⁾—

(1) L. 1. S. 4. ff. mand.

(2) L. 6. ff. eod.

(3) L. 5. S. 1. L. 22. S. 11. L. 27. S. 2. ff. L. 11. C. eod.

(4) L. 13. C. eod.

(5) L. 20. ff. eod.

(6) L. 27. S. 4.. L. 52. L. 56. S. 4. ff. eod.

(7) L. 45. ff. eod. L. 17. ff. de in rem. verso.

provided that in these the mandatory has not exceeded the due limits.⁽¹⁾ Mandate.

For the enforcement of these reciprocal obligations, the law has given to both parties the necessary actions.⁽²⁾

Mandate determines,

1. By the death of the mandatory.⁽³⁾
2. By the death of the mandator.⁽⁴⁾
3. By such alteration in the condition, or affairs of the mandator, that he has no longer *legitimam personam standi in judicio*, or the right to sue.⁽⁵⁾
4. By revocation of the *mandate*.^{(6)*}

SECT. XV.

Besides the contracts hitherto noticed, there are also some kinds of dealings and transactions, which from their similarity to contracts, produce *Quasi*
contracts.

(1) L. 5. ff. mand.

(2) Actio mandati directa et contraria.

(3) L. 27. S. 3. ff. eod.

(4) L. 26. L. 58. ff. L. 15. C. eod.

(5) L. 21. ff. de procur.

(6) L. 12. S. 16. ff. mand.

* The case of *Burrows v. Jemimo*. (2. Strange Rep. 733.) seems to have turned upon the two latter principles. For there the drawer of the bill had become a bankrupt, which by the law of Leghorn, where the acceptance was made, was an implied revocation of the mandate to accept. See the case of *Odwin and Forbes*, p. 143.—T.

*Quasi
contracts.*

similar obligations and actions. These are termed *quasi* contracts.⁽¹⁾

To which class belong the following :

1. The undertaking of the business, or concerns of another, without his order or knowledge,⁽²⁾ provided it be not against his will, or positive order ;⁽³⁾—against such a volunteer, the owner although not bound by any direct contract, has an action for an account, and compensation for any damage occasioned by any neglect on the part of the person who has thus undertaken the business of his own head.⁽⁴⁾ On the other hand, this party has a right to demand from the other, all the necessary costs, charges, and expenses, which he has been put to for his benefit.⁽⁵⁾

2. The administration of guardianship ;—for although, as between the guardian and his ward, there is not, properly speaking, any contract, yet they are reciprocally bound to each other ; the guardian to give an account to the ward, and the ward to reimburse the guardian all his costs, charges, and expenses.⁽⁶⁾

(1) T. t. Inst. de oblig. quæ quasi ex contr.

(2) T. t. ff. et. C. de negot. gest. De Groot, Inleid, 3. B. 27, D.

(3) L. 40. ff. mand. L. ult. C de neg. gest.

(4) S. 1. Inst. de oblig. quæ quasi ex contr. L. 2. L. 23. ff. de neg. gest.

(5) L. 2. L. 27. ff. eod. d. S. 1. Inst.

(6) See page 107, *supra*.

3. Community without contract.⁽¹⁾Quasi
contracts.

Thus co-heirs have an action against each other for partition of an undivided inheritance.⁽²⁾

So also co-proprietors of one and the same thing, have an action to divide it, and for an account of the profits and disbursements.⁽³⁾

4. The *accepting or entering upon an inheritance*.

This gives to the legatees, and *cestui que trusts*, a right of action for the legacies and trust property left by the will or codicil.⁽⁴⁾

5. The payment of a sum of money found afterwards not to be due. This payment so made may be recovered back, provided there existed no obligation, not even a natural one to make it, and provided also it had been made by mistake, and in ignorance.⁽⁵⁾

(1) Pothier, van Sociët. en compagn. pag. 162. et seqq.

(2) T. t. ff. fam. ercisc.

(3) T. t. ff. comm. divid.

(4) S. 5. Inst. de oblig. quæ quasi ex contr. L. 5. S. 2. ff. de obl. et act.

(5) T. t. ff. de cond. indeb. De Groot, Inleid. 3 B. 30 D. S. 4-18.

CHAPTER XVI.

On Obligations arising from Crimes and quasi Crimes.

SECT. I.

Obligations arising from crimes.

ANOTHER source of obligation is *crime*, whereby we understand the voluntary committing or omitting any thing, contrary to law, and therefore punishable under that head.^{(1)*}

Out of crime arise two kinds of obligation ; the one, to suffer the punishment affixed by law to the act, which is of a public nature, whereof we shall treat in the *following book* ; the other, to make good the damages occasioned by the criminal act ; and in this latter view, as laying the ground of a civil action, we shall here consider it.

For this purpose, we may distinguish crimes into the following classes :

1. Crimes against the *life* :
2. Against the *person* :
3. Against the *reputation* :
4. Against the *property* of our fellow men.

(1) De Groot, Inleid. 3 B. 32 D. S. 3.

* Puta *commissionis et omissionis*, sen in *faciendo et non faciendo*—Voet, ad Leg. Aquil. p. 3.

SECT. II.

Crimes against the life, or murder. This binds the party who has committed the murder to make good to the widow and children of the deceased, who were dependant on his labour for support, the loss they have suffered in this respect by his death, by way of annuity;⁽¹⁾ and this action is given to them against all those who have been accomplices in the murder, or accessories, although it cannot be satisfactorily ascertained which of them has given the deadly stroke.⁽²⁾

Crimes
against the
life.

This action also lies, although the death may not have been occasioned by *malice prepense*, but by carelessness; as, for instance, by the negligent or unskilful driving of a coachman.⁽³⁾ But in cases of homicide committed in self-defence, or from a cause entirely innocent, this action does not lie.⁽⁴⁾

(1) De Groot, Inleid. 3 B. 33 D. n. 5 et 6. Holl. Cons. 3 D. Cons. 168. Bort, nagel. Werken, Lib. 4. Tit. 2. pag. 148. seqq. Voet, ad tit. ff. ad Leg. Aquil. n. 11. et ad tit. ff. de acq. vel om. her. n. 6.

(2) De Groot, Inleid. 3 B. 33 D. S. 4. Regtsgel. Observ. 2 D. Obs. 86.

(3) De Groot, d. l. S. 5.

(4) De Groot, d. l. S. 7. 8. et 9. Regtsgel. Observ. 1 D. Obs. 92. 2 D. Obs. 87. 3 D. Obs. 95.

SECT. III.

Crimes
against the
person.

Crimes against the person ; that is, cutting and maiming, gives to the party wounded an action for indemnification of surgeons' charges, and damages for loss of time and labour. The pain and suffering, and also personal disfigurement, are estimated in the amount of damages.⁽¹⁾ If a person is wounded in a riot, he has this action against all the parties engaged therein.⁽²⁾ But wounds inflicted in self-defence, or by mere mischance, are not the subject of any action.⁽³⁾

SECT. IV.

Crimes
against
reputation.

Crimes against reputation. These also form the ground of an action for reparation.

Hereto appertain :

1. An action of injury (*actio injuriarum*), whereby are understood, as laying grounds for this action, all acts or words intended to injure a person's honour.⁽⁴⁾ These injuries are divided into those occasioned by acts, and those by words spoken or written.⁽⁵⁾ The party injured

(1) De Groot, Inleid. 3 B. 34 D. S. 2. Regtsgel Observ. 3 D. Obs. 96. Voet, ad tit. ff. si quadr. paup. fec. n. 8. et ad tit. ff. ad Leg. Aquil. n. 11.

(2) De Groot, d. l. S. 6. Regtsgel. Observ. 2 D. Obs. 89. et 4 D. pag. 255.

(3) De Groot, d. l. S. 4.

(4) L. 3. S. 1. ff. de injur.

(5) S. 1. Inst. L. 1. S. 1. ff. eod.

has an action, not only for compensation in pecuniary damages, but also for reparation of honour, which double claim is termed *amende honorable et profitable* :—*Honorable*, by causing the opposite party to ask pardon in court, for the injury he has done to the other, with the declaration that he is sorry for what has happened, and that he holds the plaintiff for a man of honour, against whose character he has nothing to say ; and *profitable*, by the payment of a certain sum to the poor.⁽¹⁾

Crimes
against
reputation.

2. The action of *seduction* or *deflowering* of a virgin, even with her consent. For this an action lies : 1st, to compel the party to marry her, or for compensation for loss of honour, in money ;⁽²⁾ but to maintain this action, she must make oath that she never has had carnal connection with any other man. Therefore, a widow cannot maintain this action.⁽³⁾ The choice whether to marry the woman, or make her a compensation in damages, lies entirely with the man, provided no previous promise of marriage can be proved against him.

2ndly. For payment of the lying-in charges,

(1) De Groot, Inleid. 3 B. 35 D. S. 2. et 36 D. S. 3. Voet, ad tit. ff. de injur. n. 17.

(2) De Groot, Inleid. 3 B. 25 D. S. 8. n. 17. Voet, ad tit. ff. ad Leg. Jul. de adult. n. 3.

(3) Voet, ad d. t. n. 4.

Crimes
against
reputation.

and in case of the death of the child, for the costs of burial.⁽¹⁾

3rdly. For a reasonable allowance for maintenance of the child.⁽²⁾ When the man is ready to declare upon oath (to which he is bound in all cases when he denies the charge) that he has never had carnal connection with the woman, and she is not prepared to shew cause why his oath should not be admitted, his oath has the preference.⁽³⁾

Against a married man, when the woman knew that he was married, no action lies except for the costs of lying-in and for support of the child.⁽⁴⁾

SECT. V.

Crimes
against
property.

A crime against property is committed when we *deprive* another of his goods. Thus thieves and robbers, independent of the punishment to which they are subjected, are bound to restore the stolen goods and indemnify the owner.⁽⁵⁾ This crime also is committed when we *purposely*, or through neglect, spoil another's goods, whereby we become liable in costs, damages, and interest.⁽⁶⁾

(1) De Groot, d. l. n. 19. Voet, ad d. t. n. 6.

(2) De Groot. d. l. n. 21. Voet, ad d. t. n. 6.

(3) De Groot, d. l. n. 22-24. Voet, d. n. 6.

(4) Voet, ad d. t. n. 4.

(5) T. t. ff. de cond. furt.

(6) T. t. ff. ad Leg. Aquil. De Groot, Inleid. 3 B. 37 D.

SECT. VI.

In like manner, as there are *quasi contracts*, so are there also *quasi crimes*, as when we occasion damage to another by any act of our's which, although not punishable by law, yet on account of our negligence or inadvertance, subjects us to damages.⁽¹⁾ For instance, when we carelessly throw or cast any thing down from the upper part of our house, whereby damage is occasioned to the clothes, &c. of the passers-by;⁽²⁾ or when a fire, occasioned in your house through your carelessness, is communicated to mine;⁽³⁾ or when the baggage of travellers is stolen through the negligence of the masters of vessels or *inn-keepers*.⁽⁴⁾

(1) T. t. ff. de oblig. quæ quasi ex del.

(2) T. t. ff. de his qui effud. vel dejec.

(3) L. 27. S. 8. L. 30. S. 3. ff. ad Leg. Aquil.

(4) T. t. ff. naut. caup. stabul.

CHAPTER XVII.

Of the different kinds of Proof or Evidence.

SECT. I.

Of proof
or evi-
dence in
general.

WITH relation to the dealings and transactions of men, whether consisting in agreements or in crimes, the question frequently is not so much with respect to the obligations and actions which arise in law therefrom, as with respect to the facts themselves, in consequence of the different accounts and representations of the parties as to what has or has not happened.

This subject therefore requires a separate chapter, in order to inquire in what way, and by whom any fact is to be proved.

We may lay down as general rules on this head,

1. That he who asserts any thing must prove it, since the opposite party who denies it, is not bound to prove a negative;⁽¹⁾ for negatives from their nature are mostly incapable of proof.⁽²⁾

2. The plaintiff is bound to prove,—not the defendant;⁽³⁾ who by failure of proof on the part

(1) L. 2. L. 18. S. 2. ff. L. 9. C. de probat.

(2) L. 23. C. eod. L. 10. C. de non num. pec.

(3) L. 21. ff. L. 8. L. 23. C. de probat.

of the plaintiff, must have a judgment without any proof on his part.⁽¹⁾

Of proof
or evi-
dence in
general.

3. When the defendant pleads any fact or thing specially, he must then, as if he were plaintiff, prove it.⁽²⁾

4. When the plaintiff and defendant agree as to the fact, but differ in the manner of stating it, or as to its circumstances, the plaintiff must first prove his statement.⁽³⁾

5. The judge must not decide on the force of the evidence simply from the letter of the instrument, or from the number of the witnesses, but from a careful consideration of the whole matter, and the concurrent circumstances of the case, and draw his conclusion as to the truth, as it appears made out in evidence.⁽⁴⁾

The principal division of evidence or proof is into *written* and *parole*. There are also some other kinds, as that from *confession*, *presumption*, a *judgment*, and an *oath*. We shall treat briefly of all these.

SECT. II.

The first sort of proof is by written instruments, which are divided into *judicial*, *notarial*, and *private* instruments or writings.

Written
proof.

(1) L. 4. C. de edendo.

(2) L. 9. L. 19. L. 25. ff. L. 1. C. de probat.

(3) L. 21. ff. L. 2. C. eod.

(4) L. 3. S. 2. L. 21. S. 3. ff. de testib. L. 1. C. plus val. quod ag.

Written
proof.

Judicial instruments are passed before two members of the court, and their secretary. In the provincial court they are passed in the presence of two commissaries, and the greffier. In the inferior tribunals, before two members and the secretary.⁽¹⁾

Notarial acts are passed before a notary, and two witnesses. The notaries are, after an examination by the court as to their fitness, appointed by the sovereign,⁽²⁾ upon letters of recommendation of the magistrate of the place where they are to practice, and are sworn before the commissaries of the court; after which on letters patent of the sovereign, creating them notaries, an act of *admission to practice*, is granted them by the magistrate of the place.⁽³⁾ The effect of which only qualifies them to act in the place of their domicile or residence.⁽⁴⁾

Private instruments or writings *under the hand of the party*, as they are termed, are either made by the parties themselves, or by a third person, by their order, and confirmed by the signatures of the contracting parties.⁽⁵⁾

(1) De Groot, Inleid. 2 B. 17. D. S. 17. S. Van Leeuwen, Cost. van Rhijnl. pag. 351.

(2) Reglen. Voor't Depart. Bestuur van Holland. Art. 47.

(3) Lybregts, Red. Vert. over't Not. ambt, 1 D. 1 Hoofdst. V. D. Schelling, Hist. van't Notarrisschap, Cap. 6.

(4) Regtsg. Obs. 1 D. Obs. 39. et 4 D. pag. 405.

(5) Mattheus, de Probat. Cap. 4. n. 1.

With regard to the force of these respective instruments, the judicial and notarial, as being *public instruments*, deserve most faith;⁽¹⁾ with respect particularly to dates, they have greater weight than private instruments, though the latter are equally valid.⁽²⁾ A private instrument is good evidence *against* the party who has signed or written it, but not *for* him;⁽³⁾ as it would be of a dangerous consequence, if any one could be allowed to produce his own writing or signature, as evidence in his favour.⁽⁴⁾

Written
proof.

Among public instruments may also be classed, those which are termed *archives* or *records*, whose evidence (provided the copies or extracts are given off with the authentication and signature of the secretary or registrar) is very great; so much so, that even private instruments, when duly registered, thereby acquire the force of public ones.⁽⁵⁾

Among private instruments admitted as evidence are particularly the *books of merchants*,

(1) Merula, Manier van Proced. Lib. 4. tit. 66. Cap. 2.

(2) Bynkershoek, Quæst. Jur. Priv. Lib. 1. Cap. 6. pag. 65. vs. "Notarii duntaxat adhibentur propter lubricam privatæ scripturæ fidem, et instrumenta, quæ scribunt, publicâ ubique auctoritate censentur."

(3) L. 29. S. ult. ff. depos. L. 13. C. de non num. pec.

(4) L. 5. L. 7. C. de probat.

(5) Leyserus, Medit. ad ff. Tom. 4. Spec. 266. Mattheus, de Probat. Cap. 3. n. 25.

Written
proof.

Judicial instruments are passed before members of the court, and their secretary; in the provincial court they are passed in the presence of two commissaries, and the greffier; in the inferior tribunals, before two members and the secretary.⁽¹⁾

Notarial acts are passed before a notary and two witnesses. The notaries are, after an examination by the court as to their fitness, appointed by the sovereign,⁽²⁾ upon letters of recommendation of the magistrate of the place where they are to practice, and are sworn before the commissaries of the court; after which a patent of the sovereign, creating them notaries, an act of *admission to practice*, is granted by the magistrate of the place.⁽³⁾ This patent, which only qualifies them to act in their domicile or residence.⁽⁴⁾

Private instruments or writings, *of the party*, as they are termed, are made by the parties themselves, or by their order, and confirmed by the signatures of the contracting parties.⁽⁵⁾

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Medit. ad ff.

Inst. de inut.

. ff. de testib.

Written
proof.

provided they are duly kept and confirmed by the oath of the merchant.⁽¹⁾

Of public instruments, the *grosse* or copy given off by the secretary or notary, and of private ones, the original should be produced.⁽²⁾ Copies are not evidence unless authenticated by a secretary or notary.⁽³⁾ When the entire deed or instrument is not necessary in the cause, an authenticated extract may be sufficient.⁽⁴⁾

SECT. III.

Proof by
witnesses.

Another sort of proof is by witnesses, a species of proof introduced merely by necessity;⁽⁵⁾ but which, by reason of the heedlessness, partiality, and other defects of human nature, is subject to great uncertainty; insomuch that with respect to the credibility of witnesses,

(1) Mattheus, de Probat. Cap. 4. n. 68-82. De Haas, Aanteek. op Merula's Manier van Proced. L. 4. tit. 66. Cap. 3. S. 6. Voet, ad tit. ff. de fid. instr. n. 12.

(2) Merula, Manier van Proced. Lib. 4. tit. 66. Cap. 4. n. 2.

(3) Ampl. Instr. van den Hove van 21 Dec. 1579. Art. 17. S. Van Leeuwen, Manier van Proced. in de Steden en ten plat-ten Lande, Art. 18.

(4) Leyser, Med. ad ff. Tom. 4. Spec. 263. The duty of notaries to be particularly careful in the making of *authentic* copies, and, in setting out the short and material contents of a deed, to make their extracts with judgment and fidelity, cannot be too strongly impressed upon them.

(5) L. 1. ff. de testib.

much must be left to the discretion of the judge.⁽¹⁾ Some persons, however, are absolutely rejected as incompetent, others have the privilege of declining, and others are subject to exceptions (reproaches), which tend to weaken or destroy their evidence.

Proof by
witnesses.

Among persons incompetent as witnesses, are lunatics and idiots ;⁽²⁾ those who are born deaf and dumb, and the like :⁽³⁾ those who have not yet reached the age of puberty, that is fourteen years in males, and twelve in females :⁽⁴⁾

Also those who are held as infamous in law.⁽⁵⁾

Those persons who may decline giving evidence, are such as are nearly related in blood, as parents against their children, and a wife against her husband.⁽⁶⁾

Those whose evidence would tend to criminate themselves ;⁽⁷⁾ also counsellors, and solicitors are excused from giving evidence, as to matters confided to them, by their clients professionally. A notary however cannot avail him-

(1) L. 3. S. 1. L. 13. ff. eod. Leyserus; Medit. ad ff. Tom. 4. Spec. 283.

(2) L. 20. S. 4. ff. qui test. fac. poss. S. 8. Inst. de inut. stipul.

(3) S. 6. Inst. de testam. ordin. L. 3. S. 1. ff. de testib.

(4) L. 3. S. 5. L. 19. S. 1. ff. eod.

(5) D. L. 3. S. 5. L. 13. ff. eod.

(6) L. 4. L. 5. ff. eod.

(7) Voet, ad. tit. ff. de testib. n. 14.

**Proof by
witnesses.**

self of this, nor a medical man, when summoned by the judge to give evidence touching the nature of some secret disease. Servants also can be compelled to give evidence against their master or mistress, provided they are not themselves implicated.⁽¹⁾

Finally, the exceptions to witnesses are of various kinds : as that the witness is interested in the cause ;⁽²⁾ or that he is nearly related by blood or marriage to one of the parties ;⁽³⁾ or that he is an inmate of him for whom he is produced as a witness,⁽⁴⁾ unless the question relate to matters which can only be known to those who live in the same house ;⁽⁵⁾ or that the witness appears prejudiced against the other party ;⁽⁶⁾ or that he is a person of such character as not to deserve belief ;⁽⁷⁾ or that he contradicts himself in his evidence, or is unintelligible, or asserts that which is manifestly false, or grounded only on hearsay, without sufficient knowledge of his own ;⁽⁸⁾ or that he is a single witness, whereas there

(1) See, respecting this, our Notes on Merula's Practice, 2 D. pag. 151.

(2) L. 10. ff. L. 10. C. de testib. L. 1. S. 11. ff. quand. appell. sit.

(3) L. 4. L. 9. ff. L. 6. C. de testib.

(4) L. 24. ff. L. 3. C. eod.

(5) L. 8. S. 6. C. de repud.

(6) L. 3. pr. ff. L. 17. C. de testib.

(7) L. 3. S. 5. ff. eod.

(8) Merula, Manier van Proced. Lib. 4. tit. 78. Cap. 5.

ought to be two to constitute full proof;⁽¹⁾ or because his testimony has not been confirmed by oath, or no opportunity afforded to the opposite party to cross-examine him.⁽²⁾

Proof by witnesses.

The answer on the other side to these exceptions taken to the witnesses is termed *Salvation*,⁽³⁾ and lastly, it is left to the judge or court finally to determine, from the circumstances of the case, the greater or less degree of credibility to be attached to the witnesses.⁽⁴⁾

SECT. IV.

The other kinds of proof, independent of written and parole evidence, are as follow :

Confession, presumption, decree, and oath.

1. The *Confession of the Party*. This, however, in order to have the effect of full proof, must be free, express, and taken before a judge. Extra-judicial confessions may raise a presumption, but do not constitute proof.⁽⁵⁾

2. *Presumption*. This as a conjecture is a species of proof drawn from circumstances as they occur in ordinary cases.⁽⁶⁾ Presumption, for the most part, raises a suspicion, surmise, or

(1) L. 9. S. 1. C. de testib.

(2) Voet, ad tit. ff. de testib. n. 15.

(3) Merula, d. l. tit 79. Cap. 2-4.

(4) L. 3. S. 1. ff. de testib

(5) Merula, Manier van Proced. Lib. 4. tit. 62. Voet, ad tit. ff. de confess.

(6) Huber, hedend. Regtsgel. 5 B. 28 Cap. n. 1.

Confession, presumption, decree, and oath.

probability ; for example, flight implies guilt.⁽¹⁾ But there are also some presumptions which constitute perfect legal proof : as when a married woman is delivered of a child a year or longer after her husband has been abroad ; this is so strong a presumption of her having committed adultery as to admit of no proof to the contrary.^{(2)*}

3. *A Judgment or Decree.* This, when passed in the proper form, is held for truth, and constitutes a full proof, or conclusive evidence between the parties.⁽³⁾ But not with respect to third persons, who are no parties to the suit.⁽⁴⁾

4. Lastly, the *Oath* of one of the parties constitutes also a kind of proof, and the parties frequently make use of it, as the plaintiff to strengthen his evidence when incomplete, or the defendant to clear himself from a presumption against him, when there is not full proof against

(1) Nov. 53. Cap. 4. Voet, ad tit. ff. de probat. et presumpt. n. 5.

(2) Voet, ad d. t. n. 16.

(3) L. 25. ff. de stat. nom. L. 207. ff. de R. J. L. pen. ff. de just. et jur.

(4) T. t. C. int. al. act. vel jud. al. non noc. L. 2. C. quib. res jud. non noc.

* See Hargrave and Butler's Notes to Coke Littleton 123 b, 126 a, and 244 a.

him. Such an offer or tender of oath by one of the parties, does not become evidence in the cause before the judge has admitted it ; but when it has been taken, the facts sworn to are held as proved between the parties.⁽¹⁾

Confession, presumption, decree, and oath.

(1) Voet, ad tit. ff. de jurej. n. 17. seqq.

CHAPTER XVIII.

On the Extinction of Obligations.

SECT. I.

IN the same manner as *real* rights are extinguished or lost in various ways,⁽¹⁾ so there are also various ways in which obligations, and the personal rights arising therefrom, are lost, cancelled, or extinguished. We shall briefly notice these.

Payment.

1. *Payment.* This is the actual fulfilment of that which the party has bound himself to give or do.⁽²⁾ For a payment to be valid, it is not necessary that it be made either by the debtor himself, or by some one in his behalf by his order; for this payment is good by whomsoever made, although the person making it has not been authorised by the debtor so to do, or though he should do it even against his will; for provided he does it in the name and on behalf of the debtor, and provided he is entitled to transfer the property in the thing thus paid for, it annuls the obligation and frees the debtor even against his will.⁽³⁾

(1) See pages 121, 122, 170, and 181 *supra*.

(2) *Pr. Inst. quib. mod. toll. obl.*

(3) L. 23. L. 40. L. 53. ff. de solut. L. 39. ff. de neg. gest.

This, however, takes place only in obligations Payment. : which consist in giving something, since where the obligation is to do a certain act, it may sometimes make a material difference to the obligee by whom this act is performed.⁽¹⁾

The payment to be valid must be made to the creditor, or some one empowered by him to receive it.⁽²⁾

When the creditor dies, leaving several heirs, payment to one is only good as to his portion of the debt, unless he has been empowered by the co-heirs to receive the whole.⁽³⁾

In case of the assignment of a debt to a third person, with notice to the debtor, payment must be made to the assignee, and payment in such case to the original creditor is not good.⁽⁴⁾

Sometimes a clause is inserted in the contract, whereby payment is conditioned to be made to a third person therein mentioned, and to be equally good as if made to the creditor himself.⁽⁵⁾

Payment made to a person not authorised by the creditor to receive it, is good—

(1) L. 31 ff. de solut.

(2) L. 12. L. 34. S. 3. ff. eod. L. 180. ff. de Reg. Jur.

(3) L. 81. S. 1. L. 104. ff. de solut.

(4) Voet, ad tit. ff. de her. vel act. vend. n. 15.

(5) L. 21. ff. de novat. Voet, ad tit. ff. de solut. n. 2.

Payment.

1. When the creditor afterwards confirms it.⁽¹⁾

2. When the money paid is applied to the use of the creditor.⁽²⁾

3. When the person to whom it has been paid becomes heir to the creditor.⁽³⁾

According to the general rule, the precise thing stipulated for must be given or paid, and the debtor cannot oblige his creditor to accept any thing else instead.⁽⁴⁾ No creditor is bound to receive against his will a partial payment, unless by the agreement the payment is to be made by instalments.^{(5)*}

The effect of payment is the extinction of the obligation and of all its consequences, as also the exoneration of all the co-debtors.⁽⁶⁾ The latter point, however, is subject to an exception when one of the several debtors or sureties pays

(1) L. 12. S. 4. ff. de solut. L. 12. C. eod. L. 24. ff. de neg. gest.

(2) L. 28. L. 34. S. 9. ff. de solut.

(3) L. 96. S. 4. ff. eod.

(4) L. 16. C. eod. L. 2. S. 1. ff. de reb. cred.

(5) L. 41. S. 1. ff. de usur. L. 3. ff. fam. ercisc.

(6) L. 43. ff. de solut.

* But the contrary was held by the Roman lawyers in favour of *liberty*; and they also held that payment before the day was good in such cases.—See “Treatise on the Roman Law of Manumissions,” by Translator, and authorities there cited, p. 29. Also page 202, *supra*.

under *cession of action* from the creditors against the co-debtors or co-sureties.⁽¹⁾

Part payment extinguishes the debt *pro tanto*, and also the interest.⁽²⁾

With respect to the crediting of the payments made, the following rules must be observed,

1. The debtor, when he makes a payment, is at liberty to declare under what head or to what account he wishes it to be entered.⁽³⁾

2. When the debtor neglects to do this, the creditor is at liberty, when he has different accounts against the debtor, to specify by his receipt the account to which he means to place it.⁽⁴⁾

3. When this is not specified by either debtor or creditor it must be carried to that account which it is most beneficial to the debtor to reduce.⁽⁵⁾

4. When the accounts are of the same nature, so as to make no difference to the debtor, the payment must be carried to the oldest account.⁽⁶⁾

5. In case the debts are of the same date and of the same nature in every respect, then the

(1) L. 17. ff. de fidejuss. L. 47. ff. locat.

(2) L. 9. S. 1. ff. de solut.

(3) L. 1. ff. eod.

(4) D. L. 1. L. 2. L. 3. ff. eod.

(5) L. 3. S. 1. L. 4. in fin. L. 5. L. 97. L. 103. ff. eod.

(6) L. 5. L. 89. S. 2. ff. eod.

Payment. payment is to be placed to the account of each, *pro rata*.⁽¹⁾

6. In debts which bear interest, the payment must be applied in reduction of the interest in the first place, and afterwards to the principal.⁽²⁾

**Consigna-
tion, or
payment
into court.**

Of equal effect with payment is *consignation* of the debt or thing due when payment has been tendered to the creditor and refused. The debtor is thereby freed, and the thing consigned, or money paid into court, lies there on the account and at the risk of the creditor.⁽³⁾

SECT. II.

Novation. 2. The *Novation* of debt is the creation of a new debt in place of the old one ; either by taking a new and different obligation in extinction of the old one,⁽⁴⁾—whether this is done between the same debtor and creditor, or whether a new debtor takes upon himself entirely my debt ;⁽⁵⁾ or when the debtor, in order to be released from his original creditor, enters by his order into an obligation with a new creditor.⁽⁶⁾

(1) L. 8. ff. eod.

(2) L. 1. C. eod. L. 5. S. 2 et 3. L. 6. ff. eod. L. 35. ff. de pign. act. L. 21. C. de usur.

(3) Voet, ad tit. ff. de solut. n. 29.

(4) L. 1. ff. de novat. et deleg. S. 1. Inst. quib. mod. toll. obl.

(5) L. 7. S. 8. ff. de dol. mal. L. 4 ff. de cond. caus. dat.

(6) L. 11. ff. de novat. et deleg. S. pen. Inst. quib. mod. toll. obl.

In order to constitute *Novation*, the express Novation. and declared will of the creditor to make a novation is requisite.

Conjectures and suppositions are not sufficient, but a new contract or obligation is rather presumed in such case for the purpose of strengthening the original contract or obligation rather than of annulling it.⁽¹⁾

The effect of *Novation* is, that the first or original debt is cancelled as effectually as it would be by actual payment, and, consequently, the mortgage or security for the debt, unless this be expressly transferred as security for the new debt.

The sureties also for the old debt are not bound for the new without their express consent.⁽²⁾

SECT. III.

3. *Release of the Debt.* This may take place Release. not only by express, but also by tacit agreement, to be inferred from certain acts which raise this presumption ; for example, when the creditor returns to the debtor his acknowledgement or obligation he is supposed thereby to have remitted the debt.⁽³⁾

(1) L. ult. C. de novat. C. F. Walchius, in Introd. in Controv. Jur. Civ. Sect. 3. Cap. 8. S. 7

(2) L. 18. ff. de novat. L. 12. S. 5. ff. qui potior.

(3) L. 2. S. 1. ff. de pact.

Release.

However, restoring the things given in pledge as security, though it releases them, does not release the debt itself.⁽¹⁾

Releases or acquittances are of several kinds : sometimes the entire debt is considered as released, and all the co-debtors freed ;⁽²⁾—sometimes it only extends to one of the debtors and the co-debtors remain bound.⁽³⁾

Thus, in the case of two persons being each a debtor, *in solidum*, for the same debt, or bound jointly and severally, the release to one frees him only, and not his co-debtor or co-obliger.

The release to the principal debtor induces that of the surety ; but not, *vice versa*, for a release to the surety does not free the principal debtor no more than a personal release to one of the sureties frees the others.⁽⁴⁾

No one but the creditor himself, when he has the right of disposing of his property, can release a debt except those who are specially empowered by him for this purpose.

An attorney, acting under a general power, a guardian, curator, or administrator, has not this right, since all such persons have only the power to administer and not to give away.⁽⁵⁾

(1) L. 3. ff. eod.

(2) L. 21. S. ult. L. ult. ff. de pact. L. 7. S. 1. ff. de except.

(3) L. 7. S. 8. L. 17. S. 3. L. 25. S. 1. ff. de pact.

(4) L. 23. ff. de pact. L. 15. S. 1. ff. de fidejuss.

(5) L. 37. ff. de pact. L. 22. ff. de adm. tut.

SECT. IV.

4. *Compensation, or set-off*, by which is understood the reciprocal extinguishment of mutual debts by setting one against the other;⁽¹⁾ for example, if I owe you five hundred guilders for money borrowed, and on the other hand I am your creditor for the like sum on account of rent, then is your debt against me extinguished by being set against my demand on you for a like sum; and, again, the debt for which you may be sued on my account is cancelled by the debt which you have against me.

Compensation, or set-off.

In order to constitute the right of set-off, or compensation, it is necessary, first, that the debts or obligations to be set against each other be of the same nature as money against money, but not money against grain.⁽²⁾

2. That the debt brought in compensation or set-off has become due and payable.⁽³⁾

3. That the debt be of a liquid nature.⁽⁴⁾

4. That the debt be due to the party himself who claims the set-off;⁽⁵⁾ and,

5. That the debt be due by the very person against whom we claim to set it off.⁽⁶⁾

(1) L. 1. ff. de compens.

(2) L. 10. S. 2. L. 11. L. 12. ff. L. 4. L. 8. C. eod.

(3) L. 7. ff. eod.

(4) L. ult. S. 1. C. eod.

(5) L. 9. C. eod.

(6) L. 23. ff. eod.

Compensation, or set-off.

The effects of *set-off* by operation of law,⁽¹⁾ are,

1. That in case my creditor, with whom I have deposited effects as a security, afterwards becomes my debtor, I can demand these effects back, provided I offer him the balance due to him.⁽²⁾

2. That when a debt carries interest, and the debt to be set off against it does not bear interest, the debt bearing interest is extinguished to that amount, and the interest in the same proportion.⁽³⁾

3. That although my creditor is not bound to accept a partial payment, yet, however, when he becomes my debtor for a less sum than I owe him, he is obliged to abate his demand *pro tanto*, as the legal consequence of *set-off*;⁽⁴⁾ and

4. That having paid a debt already extinguished by set-off, we are entitled to recover back the money so paid,⁽⁵⁾ as not being due unless such payment be made in satisfaction of a judgment.⁽⁶⁾

SECT. V.

Merger.

5. *Merger, or confusion of claims*, is when the

(1) L. 21. ff. L. ult. C. eod.

(2) L. 12. C. eod.

(3) L. 11. ff. L. 4. C. eod.

(4) D. L. 4.

(5) L. 10. S. 1. ff. eod.

(6) L. 2. C. eod. L. 1. C. de cond. indeb.

title of creditor and debtor with respect to the same debt are united in the same person; for example, when one becomes heir to the other.⁽¹⁾ By this event the obligation of the surety also becomes extinguished;⁽²⁾ for as the principal debt or obligation no longer exists, the accessory obligation ceases also.⁽³⁾ But when the creditor becomes heir to the surety, or *vice versa*, the principal obligation does not thereby cease to exist.⁽⁴⁾ In order that this merger should take place, the party must be creditor or debtor for the entire debt; since, if he is such only for a part, the merger extends only to that part. In the same manner, if he is heir only to a part, the debt with respect to his co-heirs, continues to exist as to their portions ⁽⁵⁾

Merger.

SECT. VI.

6. *The perishing or destruction of the thing itself bound*, as the subject of the obligation, extinguishes the obligation,⁽⁶⁾ provided the destruction is entire, and not occasioned by the act or neglect of the debtor,⁽⁷⁾ otherwise he is then,

Loss, or destruction of the thing.

(1) L. 95. S. 2. L. pen. in fin. ff. de solut.

(2) L. 38. S. 1. ff. de fidej. L. 34. S. 8. L. 71. ff. de solut.

(3) L. 129. S. 4. ff. de Reg. Jur. L. 2. ff. de pecul. leg.

(4) L. 71. ff. de fidejuss.

(5) L. 50. ff. de fidejuss. L. 1. C. de hered. act.

(6) L. 33. L. 57. ff. de Verb. obl.

(7) L. 82. S. 1. L. 91. S. 2. ff. eod.

Loss, or
destruction of the
thing.

as well as his heirs and sureties, bound to make good the value.⁽¹⁾

SECT. VII.

Lapse of
time.

7. *The lapse of the time* for which the obligation was entered into ; for instance, if I become surety for any one on condition of not remaining bound beyond the term of three years.⁽²⁾ To this head also pertain all loans made upon annuities for lives which drop by the death of the parties for whose lives they were granted.⁽³⁾

In like manner, when an obligation is entered into, on condition of lasting no longer than until the occurrence of a certain event ; for example, in case I become security for any one until a certain vessel, in which he has considerable interest, shall have arrived,—the arrival of the vessel releases me from this obligation.⁽⁴⁾

SECT. VIII.

Prescription.

8. *Prescription* also extinguishes obligations, so far that, after the lapse of a certain time, limited by law, the right of action on them is lost.⁽⁵⁾ Accord-

(1) L. 91. S. 4. et 5. ff. eod. L. 58. S. 1. ff. de fidejuss. L. 24. S. 1. ff. de usur.

(2) L. 44. S. 1 et 2. ff de obl. et act. L. 56. S. 4. ff. de Verb. obl.

(3) De Groot, Inleid. 3 B. 14 D. S. 20.

(4) L. 59. S. 5. ff. Mand.

(5) De Groot, Inleid. 3 B. 46. D. S. 2. Regtsgel. Observ. 2. D. Obs. 97.

ing to our law this limitation is generally fixed at *the third of a century*.⁽¹⁾ Though some authorities hold the period of *thirty years* as sufficient in personal actions.⁽²⁾ In yearly rents the mere lapse of thirty years without demand of payment is not sufficient to discharge the debtor with respect to those arrears which have not been due thirty years; for there are only as many prescriptions pleadable as there are years' rent due over this time.⁽³⁾

Prescription.

SECT. IX.

9. *Transaction, accord, or release*, cancels or annuls the obligation to which it relates, it being with respect to its effect of equal force with a sentence or decree in which both parties have acquiesced.⁽⁴⁾

Transaction, or release.

SECT. X.

Relief, or replacing the party in his original state before the contract, (*Restitutio in integrum*) cancels the obligation against which relief is sought.⁽⁵⁾

Relief.

This remedy is by virtue of *letters patent*, issued by the court of justice, (*mandament of*

(1) Matthæi, Paroem. 9. Loenius, Decis. et Obs. Cas. 76.

(2) Bynkershoek, Quæst. Jur. Priv. Lib. 2. Cap. 15. in init.

(3) V. D. Keessel, Thes. 875.

(4) L. 2. ff. de jurej. L. 20. C. de transact.

(5) Voet, ad tit. ff. de in int. rest. n. 21.

Relief.

relief, or civil petition,) addressed to the judge of the domicile, who, after a previous suit at law, and proper inquiry into the circumstances of the case,⁽¹⁾ affords this relief, provided there be good reasons, which by law are limited to fear, violence, fraud, minority, absence, excusable error, and prejudice in above half the value of the thing; and further, such equitable grounds as may justify the resolution or cancellation of the contract.*⁽²⁾

SECT. XI.

Cessio bonorum.

Cession, or cessio bonorum, or giving up one's property to one's creditors, may also be classed among the modes of extinguishing obligations, in so far that the debtor who has obtained this writ, or had it *interinated* or confirmed before the judge of his domicile,⁽³⁾ is not liable to the demands of his creditors further than as he may afterwards come to better circumstances.⁽⁴⁾

Finally, some writers also reckon the judg-

(1) See my Treatise on the Practice of the Courts, 4 B. Ch. 1.

(2) D. D. ad Lib. IV. Digest. De Groot, Inleid. 3 B. 48 et 52. D.

(3) See my Treatise on the Practice of the Courts. 2. B. 31 Ch.

(4) L. 4. pr. ff. de cess. bon. De Groot, Inl. 3 B. 51 D. S. 6.

* See infra.—T.

ments of a court of competent jurisdiction, and the oath in court of one of the parties, as one of the modes of extinguishing obligations,—but not correctly. Since, although both of these undoubtedly form a plea in bar to an action on the obligation,⁽¹⁾ yet they tend much rather to shew that the obligation, which is the ground of action, has never existed.

*Cessio
bonorum.*

(1) De Groot, d. l. 49. et 50 D.

INSTITUTES
OF THE
LAWS OF HOLLAND.

BOOK II.

ON CRIMINAL LAW.

CHAPTER I.

Of Crimes in General.

SECT. I.

By crimes we understand those voluntary and injurious acts which are not only contrary to, but punishable by law. They are committed either maliciously, fraudulently, and aforethought, and these are most deserving of punishment; or through negligence, and so worthy of a less degree of punishment; or through mischance or accident, which latter

Crimes,
and their
division.

Crimes,
and their
division.

cannot properly be imputed to the party as a crime.⁽¹⁾

SECT. II.

Perfect
and
imperfect
crimes.

In all crimes we must consider whether the party has so far completed the act that nothing more is wanting to the perpetration of the crime by him meditated, according to his view of it,—or the contrary.

Hence crimes are divided into *perfect and imperfect*; as to the latter, we must further consider whether the crime consist only in the intention of the party, and if so, then whether this intention has been made manifest by any *overt* act, and if so, how far.⁽²⁾ It is also of importance to consider whether the party has perpetrated the act at once, or by continuous or *renewed* attempts; also whether he has *repeated* the crime, or whether it be only a first offence.

SECT. III.

Who is to
be regard-
ed as
criminal.

In examining who is to be considered as criminal or not, the following things are to be considered.

The law
ordaining
punish-
ment.

1. To render any act criminal in law, it must be supposed that there exists some law which

(1) J. C. Von Quistorp, Grundsätze des Deutschen Peinlichen Rechts, 1 Th. S. 25.

(2) Boehmer, ad Const. Crimin. Carol. ad Art. 131. S. 38. et Art. 178. S. 6.

affixes a punishment to the commission of this act. Where no such law exists there is no crime in law, although the same act may be prohibited under a heavy punishment in other countries.⁽¹⁾

The law
ordaining
punish-
ment.

2. The mere intention to commit a crime does not of itself constitute crime,⁽²⁾ (in law) unless accompanied by some *overt* act duly proved by evidence, and not inferred by presumption; but if such acts are proved, we must then inquire with what object they have been done.⁽³⁾ Since it is the intention or consciousness of the party who commits the act which properly constitutes its criminality.⁽⁴⁾

Criminal
purpose or
intention.

This criminal intention is presumed from the act itself, and the innocence of the intention must be shewn *aliunde*.⁽⁵⁾

In the same manner as there are degrees of negligence, so are there also in the wickedness of the object of the criminal; and the judge, in apportioning the punishment, should have especial regard thereto.⁽⁶⁾

(1) Quistorp, S. 32.

(2) L. 18. ff. de pæn. L. 225. ff. de Verb. sign.

(3) L. 41. in fin. ff. ad Leg. Aquil. L. 39. L. 53. pr. ff. de furt. L. 79. ff. de Reg. Jur.

(4) L. 4. S. 1. L. 7. ff. ad Leg. Corn. de sicar. L. 1. L. 5. C. eod.

(5) L. 1. C. ad Leg. Corn. de sicar. L. 5. C. de injur.

(6) G. Fielangirie, Science de la Législation, Tom. 4. Chap. 14.

Crimes
through
negligence.

3. When a crime or offence has its origin, not so much in the will and intention of the party, as in the want of proper caution and attention, it is termed a *crime through negligence*.*

If the punishment of death, or loss of limb be affixed to the offence, an accurate distinction must be made between design and negligence,⁽¹⁾ since offences committed through the latter can never be capitally punished, and are very seldom visited with the usual corporal punishment.⁽²⁾

Injury by
accident.

4. When the act is occasioned neither by the intention, nor by the carelessness of the party, but by mere mischance, and is therefore purely accidental, the party is neither subject to damages nor punishment.⁽³⁾

SECT. IV.

Idiots, &c.

5. Persons of *defective understanding* and

(1) L. 4. S. 1. L. 7. ff. L. 1. L. 5. C. ad Leg. Corn. de sicar.

(2) Boehmer ad Carpzovii Prax. Crimin. Quæst. 27. Obs. 1.

(3) S. 5. Inst. L. 31. L. 51. ff. ad Leg. Aquil. Boehmer, ad Const. Crim. Carol. Art. 146.

* With the criminalists the degrees of negligence are classed as follows :—The first degree is termed *culpa* : the next, *culpa lata*, and the third, or greatest degree, *culpa latissima* ; and it is held that this very gross degree of negligence, *culpa latissima proxima est dolo* ; by which latter term, or *dolo malo*, a felonious intention is implied.

will are not answerable for acts committed by Idiots, &c. them in that state.

Thus furious and insane persons, and idiots, are not subject to punishment.⁽¹⁾ On this head, however, it is the duty of the judge carefully to ascertain whether this defect of intellect be of such a nature as to exclude all suspicion of a malicious intention in the party, particularly whether he has at times lucid intervals ; with a view to determine thereby whether there is ground to affix the ordinary punishment, or one of a milder nature.⁽²⁾

6. Persons of simple or limited intellect are not to be confounded with insane persons or idiots, nor with those who are become *childish*, and are in their *dotage* ; the latter of whom are frequently classed with insane persons.⁽³⁾ But by this description we mean rather a *simple, innocent, stupid* sort of people, forming a middle class between persons in their dotage and those in the full possession of their faculties. Those persons are capable of committing real crimes, and may, according to circumstances, be punished by loss of life or limb ; since in crimes the question is not so much whether the party

Persons of
weak
intellects.

(1) L. 12. ff. ad Leg. Con. de sicar. L. 13. L. 14. ff. de offic. Præsid. L. 40. ff. de Reg. Jur. L. 9. S. 2. ff. ad Leg. Pomp. de parric.

(2) Matthæus de Crim. in Proleg. Cap. 2. n. 6.

(3) Quistorp, S. 39.

Persons of
weak
intellects.

possesses a strong understanding and an accurate knowledge of the laws, as whether he was conscious at the time that he was doing an unlawful act which would subject him to punishment.⁽¹⁾

However, this simplicity, when properly proved, is a strong ground of excuse even in crimes punishable with death, and particularly in those which are grounded on (culpable) negligence, and wherein no special object or design appears.⁽²⁾

Melan-
choly.

7. It is more difficult to determine how far persons of a *melancholy* or *dejected state of mind* are entitled to lenity or excuse. In general, no great allowance is to be made, when such persons being in better spirits have the use of their understanding. But, nevertheless, it is beyond doubt that men sometimes may be affected with so deep a degree of melancholy, that they may be considered as persons really insane, and thus not answerable for acts committed by them in that state. Such persons, however, to prevent further accidents, may be confined.⁽³⁾

A distinction must also be made between such melancholy persons and those, who being

(1) Leyser, Med. ad Pand. Tom. 9. Spec. 599.

(2) Leyser, d. l. Quistorp, S. 39.

(3) Boehmer, ad Const. Crim. Carol. Art. 179. S. 6. Carpzovii, Prax. Crim. Quæst. 145. ibique Boehmer, in Observ. V. Hall et Hamelsveld, Harman Alfkens. Amst. 1798.

tired of life, commit a crime ; on whom the ordinary punishment is to be inflicted.⁽¹⁾

Melan-
choly.

8. *Deafness and Dumbness* may also be taken into consideration when the parties are born so, and there are reasons to doubt the possibility of an evil intention ; but, for preventing further accidents, it is best to place such persons in confinement for life,

Deafness
and
dumbness.

But if the party has become deaf or dumb by accident, and sufficient proof appears of an evil intention, he is most assuredly liable to punishment.⁽²⁾

SECT. V.

9. *Drunkenness* being of itself an offence, and with respect to military persons punishable,⁽³⁾ it is therefore no sufficient ground of excuse.

Drunken-
ness.

However there may be cases in which the judge ought to attend to this circumstance ; and a distinction is then properly made whether the party became intoxicated of his own accord, or has been made so against his will.

If he has been drawn into this state by the example or inducement of others, this may sometimes be a reason for adjudging a less punishment than ordinary, that is, an extraordi-

(1) Boehmer, ad Const. Crim. Carol. Art. 137. S. 23.

(2) Carpzovii, Prax. Crim. Quæst. 147.

(3) G. Feltman, over den Articul-brief, Art. 67.

Drunken-
ness.

nary one ;* but if, on the contrary, he has voluntarily brought himself into a state of intoxication for the purpose of giving himself more courage and firmness to commit the act, then this state of intoxication is by no means an excuse : on the contrary, the crime and measure of punishment are thereby rendered greater than they would be if he had committed the act when sober.⁽¹⁾

If the drunkenness, though voluntary, be followed by a total insensibility, and there is no proof of a previous bad intention, but, on the contrary, the party evinces a sincere repentance, there may sometimes be reasons for mitigating the punishment ; but all depends on the circumstances which should all concur in favour of the party ; since, in general, the judge should not easily admit intoxication as a good ground of excuse⁽²⁾

Anger.

10. The excuse on account of *wrath* or *anger* is not, properly speaking, admissible. But if there appear any mitigating circumstances in favour of the party, for example, that he had just grounds for his anger, or that he was not the first to commence the quarrel, and if he exhibits

(1) Leyser, Med. ad Pand. Tom. 1. Spec. 59. th. 3. et Tom. 5. Spec. 348.

(2) Carpzovii, Prax. Crim. Quæst. 146. Quistorp, S. 42—44.

* See note, *infra*.

immediately after the act a sincere repentance, if no proof appear of a previous evil intention, and he is a young person, and the like, these circumstances may be taken into favourable consideration in awarding the punishment.⁽¹⁾ Anger.

11. When the party pleads ignorance of the law annexing a *punishment* to the act in question, a distinction must be made whether the act was of a nature so horrible that its criminality must have been manifest even to the most ignorant and uneducated, in which case this pretended ignorance is of no avail.⁽²⁾ But if there is ground to suppose that, from the very rare occurrence of such act, or for other reasons, the rigour of the law was unknown to the party, the judge may, on the grounds of the want of knowledge and experience, mitigate, but not entirely remit the punishment.⁽³⁾ Ignorance of the law.

This excuse is more readily admitted when the law in question is of a local nature, or peculiar to that particular country, and the party is a foreigner. But if he be an inhabitant of the country, and the law has been duly promulgated and sufficiently made known, and there is no proof of its having fallen into disuse, then the

(1) Carpzovii Prax. Crim. Quæst. 6. Quæst. 18. n. 5. seqq. Quæst. 147. n. 41. seqq. ibique Boehmer in Observ.

(2) L. 2. C. de in jus voc. L. 11. S. 10. ff. ad. Leg. Jul. adult. L. 37. ff. de minor. L. 7. C. unde vi.

(3) Boehmer, ad Const. Carol. Art. 179. S. 12.

Ignorance
of the law:

pretence of ignorance avails nothing.⁽¹⁾ As little serves the pretence of the party, that, although he knew the existence of the law, he was not aware that it was applicable to his case; at least, this mistake on his part should appear to have been unavoidable, and very clearly so, from the concomitant circumstances, in order to authorize the judge to notice it.⁽²⁾

SECT. VI.

Infants.

12. Children under seven years of age are not punishable for their acts, though contrary to law, as they are not supposed to have a proper use of their understanding or will; much less can evil intention or negligence be imputed to them.⁽³⁾ They cannot, therefore, be legally punished as for crimes.⁽⁴⁾ But in order to restrain their evil disposition, they are chastised by their parents, guardians, or masters.⁽⁵⁾ When children are above seven years, but under the age of puberty, *i. e.* fourteen, in cases of trifling misdemeanours, they are left to the correction of their parents, &c.:⁽⁶⁾—but in offences of a graver nature, and where there is reason to

(1) Quistorp, S. 48.

(2) Quistorp, S. 49.

(3) L. 23. S. 2. ff. de edil. edict. L. 22. ff. ad Leg. Corn. de fals. L. 12. ff. ad Leg. Corn. de sicar.

(4) L. 7. C. de poen.

(5) Boehmer, ad Const. Crim. Carol. Art. 179. S. 2.

(6) Boehmer, d. l. Art. 164. S. 1.

suppose an evil intention in them beyond their years, they are not subjected to the ordinary punishment, but punished by whipping, or imprisonment for a time, or some other milder punishment.⁽¹⁾ Infants.

13. With respect to those who have past the age of fourteen, but who are not yet of full age, their minority, in cases of incontinence, and of crimes of no great importance, may be noticed in mitigation.⁽²⁾ Minority.

But in a case of a grave nature, and frequently committed, and if the party be not much under age, then there is every reason to suppose in him an evil intention, and his minority avails but little.⁽³⁾ If, on the contrary, no sufficient proofs appear of evil intention, if he repents and is sorry for the act, and it is the result rather of an excess of passion than of deliberate malice, and there are grounds to hope for his amendment, the minority has considerable weight in mitigation of punishment, even in crimes which induce capital or corporeal punishment.⁽⁴⁾

(1) L. 37. ff. de Minor. L. 6. pr. ff. ad Leg. Jul. pecul. L. 1. S. 32. ff. ad. Sct. Silan.

(2) L. 1. C. si adv. del. L. 37. S. 1. ff. de minor. L. 108. ff. de Reg. Jur. L. 16. S. 3. ff. de poen.

(3) L. 9. S. 2. L. 37. S. 1. ff. de minor. L. 38. S. 4. ff. ad leg. Jul. de adult.

(4) L. 108. ff. de Reg. Jur. L. 16. S. 3. ff. de poen. Cocceii Exerc. Curios. Tom. 2. Disp. 41.

Involun-
tary acts.

14. Since all crimes consist in the free and voluntary commission of the act in question, therefore no acts done by persons in their sleep, or noctambulists, are subject to punishment.⁽¹⁾

SECT. VII.

Accom-
plices be-
fore the
fact, or
conspira-
tors.

Those who aid and abet in the commission of a crime, in such a way as that without their co-operation and assistance it could not have been perpetrated, are termed *accomplices*. When this is the result of a previous engagement and agreement, to accomplish and effect in conjunction a certain criminal act, such a *plot* is termed a *conspiracy*.

If, therefore, the parties to this plot have met together, or have made preparation to accomplish a certain act in concert by their mutual co-operation and support, or have acted as spies or sentinels for the others in case of danger, they are all equally punishable as accomplices or accessories *before the fact*, although the act itself, as a murder, for instance, has been committed by one of them only; unless the special circumstances of the case may justify an exception in favour of one, as when any one of them has become a party through force or simplicity.⁽²⁾ If, as the consequences of different parts of the same plot, several crimes of different natures have

(1) Boehmer, ad Const. Crim. Carol. Art. 179. S. 7.

(2) Boehmer, d. l. Art. 148. S. 1. Quistorp, S. 54.

been committed at the same time, and which have no immediate connection with each other, each act must be considered by itself without relation to the other, although the perpetrators are all parties to the same plot.⁽¹⁾

Accomplices before the fact, or conspirators.

SECT. VIII.

If the participation in the crimes of others is not the result of a previous plot, but consists in merely promoting the commission of the crime, a distinction must be made between such as have directly aided and assisted in the commission of the crime, and those who, on that occasion, or afterwards, are guilty of unlawful acts by which the crime is accomplished or concealed.

Accomplices.

The first are, properly speaking, *accomplices* (*socii criminis*), or *accessories before the fact*, who are equally subject to capital or corporeal punishment with the principals. The others are merely promoters or furtherers of the crime, and generally suffer less, *i. e.* an *extraordinary punishment*.^{*(2)}

(1) Quistorp, d. l. in not.

(2) Boehmer, d. l. Art. 177. S. 1 et 2.

* By *extraordinary* punishment is generally understood, in the Dutch law, a *less* punishment than that affixed by the law. The same may be observed of *discretionary* punishments, which by the author are termed *arbitrary* punishments.—T.

Accom-
plices.

With respect to this furthering of the commission of the crime, we must accurately consider the degree of participation, whether it is *perfect* or *imperfect*, and by this the degree of punishment is limited; for example, when any one has furnished or procured the tools or implements necessary for the undertaking of which he is aware, although he has had no hand in the execution, in this case his participation is perfect.⁽¹⁾ A person also may participate in a crime after it has been committed, as when he harbours and conceals the parties, or participates in the plunder obtained thereby, &c.⁽²⁾

Ordering
the com-
mission of
a crime.

The giving any order or charge to another to commit a crime, is held as participation therein, and in allotting the *quantum* of punishment, the circumstances must be considered; for example, whether with the giving the order, the manner of executing it has been prescribed, or the person charged with the execution is one under the authority of and in subjection to the other, &c.⁽³⁾

Counsel-
ling or
advising.

In like manner the counselling or advising the commission of any crime is held to be participation. Herein also the circumstances come

(1) Quistorp, S. 56.

(2) L. 1. C. de his, qui latron. Boehmer, d. l. Art. 177. S. 9. Quistorp, S. 57 et 58.

(3) Boehmer, d. l. Art. 177. S. 4. Putman, Opuscul. Jur. Crimin. No. 1.

into consideration ; for example, whether the advice is general, or points out the mode of execution, or the party who commits the act already had the intention to do it, and is only thereby more fortified and encouraged to do it, or whether this advice has first prompted him to the act.⁽¹⁾

Counsel-
ling or
advising.

The *not preventing* or *hindering* the commission of crimes by others, subjects the party to extraordinary punishment, particularly when he had the means of so doing, or could be considered under an obligation so to do.⁽²⁾

Not pre-
venting the
crime.

In short, from what we have above stated, it is clear that an attentive and sound consideration of the case, with all the accompanying circumstances, must guide the judge in determining the degree of guilt of the offender.

The *concealment* or not giving notice of any crime about to be committed, is also considered as a species of participation, subject to extraordinary punishment. But if the crime has already been committed, then the concealment of it is not punishable, unless its discovery concerns the welfare and safety of the state, or some special law ; or the holding some particular office impose this duty on us.⁽³⁾

Conceal-
ing the
crime.

(1) Quistorp, S. 60.

(2) Quistorp, S. 61.

(3) Boehmer, de obligatione ad revelandum occulta, in Exercit. ad Pand. Tom. 6. Exerc. 97.

SECT. IX.

Magnitude
of crimes,
how esti-
mated.

In general, the magnitude of crimes is estimated according to the following rules :

1. A crime is greater in proportion to its being more or less a breach of our obligations to do, or not to do, a certain thing.

Hence a crime against the state is greater than a crime against an individual.⁽¹⁾

2. A crime also is greater in proportion to the design of the offender, and his consciousness that he is doing wrong. Therefore the repetition of the crime is considered as more heinous than the first offence ; and in like manner the guilt of those persons is aggravated, who repeat an offence, after having been already punished for it.⁽²⁾

3. A crime also is greater in proportion to the mischief, or injury occasioned thereby. Therefore a crime actually perpetrated, is greater than that which has only been in contemplation. A crime also is aggravated when it is accompanied with other crimes perpetrated at the same time.

According to these rules the magnitude of the offences of accomplices is estimated ; thus it is a greater crime to be an accomplice, as the result of a previously concerted plan, than to

(1) Grotius, de J. B. ac P. Lib. 2. Cap. 29. S. 29.

(2) L. 28. S. 3. ff. de poen.

have contributed to the commission of a crime accidentally, and by a single act. Actual assistance or co-operation in the commission of a crime, is a greater offence than mere advice or counsel.

Magnitude
of crimes,
how esti-
mated.

The punishment also of a crime, is less severe when we have been instigated to it by our parents, or others to whom we owe obedience.⁽¹⁾

(1) L. 157. pr. ff. de Reg. Jur. Leyser, Medit. ad Pand. Tom. 9. Spec. 580. Th. 8.

CHAPTER II.

Of Punishments in general..

SECT. I.

Punish-
ments,
and their
object.

By *punishment* we understand the suffering inflicted on any one, on the part of the sovereign, on account of the non-fulfilment of the duties imposed upon him by the laws of the state of which he is a member. The chief object of punishment is to make an impression upon others, and thus restrain them from further disturbing the peace and security of the state by such acts.⁽¹⁾ In regard to punishments which are not capital, they should also tend to the reformation of the offender :⁽²⁾ and further if possible to procure satisfaction to the party injured.

SECT. II.

Different
kinds of
punish-
ment.

Punishments are divided into *greater* and *less*. The greater affect life or limb; and are, again, either simple or aggravated by additional tortures.

They are also divided into *ordinary*, which are inflicted on all malefactors for the same crime, and *extraordinary*, which vary according as the

(1) L. 1. C. ad Leg. Jul. repetund.

(2) L. 20. ff. L. 14. C. de pœnis.

crime is deemed of greater or less magnitude, from the special circumstances of the case, or the person.

Different
kinds of
punish-
ment.

With respect to the different kinds of capital and corporal punishments, the more we go back to the dark ages, the greater pleasure we find was taken in punishments of the most exquisite cruelty and barbarity ;⁽¹⁾ and, on the contrary, the nearer we approach the more civilized and enlightened, the greater is the reprobation of this excessive cruelty in punishment ; and it is now considered that the judge acts more consistently with his character and dignity, when he is necessarily severe, but not cruel.^{(2)*}

The capital punishments yet in use, are :

1. Breaking on the wheel with or without decapitation.

(1) Heineccii, Elem. Jur. Germ. Lib. 2. Tit. 30. Putman, Elem. Jur. Crim. Lib. 1. Cap. 2. S. 66. seqq.

(2) Seneca, de Ira, Lib. 1. Cap. 5, 14, 15, et 16. L. 11. pr. ff. de pœnis.

* The following character of a firm and upright judge, as drawn by the Roman lawyers, may perhaps be acceptable to the reader : “ In cognoscendo, neque excandescere adversus eos, “ quos malos putat, neque precibus calamitosorum inlacrymar; “ judicem oportet : id enim non est constantis et recti Judicis, “ cujus animi motum vultus detegit. Et summatim ita jus “ reddet, ut auctoritatem dignitatis ingenio suo augeat.”— Callistratus, L. 19. S. 1. ff. de Offic. Præs.

See Translator's Report on the Criminal Law at Demerara.— p. 23.

Different
kinds of
punish-
ment.

2. Hanging.

3. Decapitation.

4. Strangling with or without scorching.

Quartering, burning, and drowning, are fallen into disuse, and so also for some years past, is the practice of leaving the body exposed on the wheel, or on a gallows outside the town, until consumed by the air, or birds of prey.⁽¹⁾

The corporal punishments still in use, are :

1. Whipping with or without the halter on the neck, and with or without being branded or marked with a hot iron.

2. Confinement to hard labour.

3. Condemnation to public labour.

4. The waving of the sword of the executioner over the head.

5. Public exposure on the scaffold, with or without rods.

6. The begging pardon of God, and the court of justice, on bare knees.

7. Imprisonment for some days, on bread and

(1) Publ. Holl. 6 March 1795. Whether the unlimited abolition of this usage be proper in every respect is a question. Is it, it may be asked, so improper to keep alive in horrible cases the remembrance of their exemplary punishment, to the terror of evil-doers, by the public exposure of the bodies of the malefactors ?

We have frequently turned this in our minds, and we see, with interest, that the framers of the project of a new criminal code, p. 15, have considered these questions on our part as well founded.

water. The punishments by deprivation of member, or limb, or mutilation of the body, have been long since abolished as barbarous. The only examples still remaining are the piercing of the tongue with a spike, the cutting across the face, and some others.

Different
kinds of
punish-
ment.

To the above mentioned punishments may also be added those which, although not immediately inflicted on the body of the offender, yet are nevertheless for good reasons applied in many crimes.

Among these are :

1. Banishment for life, or for a certain term, either from the country, or from a certain district, or particular place.⁽¹⁾

2. The declaring any one void of honour, and infamous.

3. The declaring him to have forfeited his office.

Lastly, it is frequently no improper mode of checking crimes to punish the offender in his goods, by imposing upon him a pecuniary fine, or mulct, heavier or lighter according to circumstances, with condemnation to corporal

(1) On the important question whether and in what cases the judges of Holland have the power of banishing beyond their own jurisdiction, see Bynkershoek, Quæst. Jur. Publ. Lib. 2. Cap. 17. V. D. Wall, Handv. van Dordrecht, 2 D. pag. 700 et 701.

Different
kinds of
punish-
ment.

punishment in case it be not paid by a certain day.⁽¹⁾

SECT. III.

Degrees of
punish-
ment.

Although it is the duty of men and christians to banish from their criminal codes all that is cruel and barbarous, yet it would be absurd to punish the same crimes always with one and the same sort of capital or corporal punishment.⁽²⁾ There are in crimes of the same species frequently considerable degrees of aggravation and mitigation which must be noticed in awarding the punishment. In fact, it would be an absurdity to punish the murderer, the house-breaker, and the thief, with the same sort of punishment.

Confisca-
tion.

Formerly, capital punishments were aggravated by confiscation or forfeiture of goods; but since the year 1732 this has been abolished in Holland,⁽³⁾ and justly, since any punishment by which the children and family of the malefactor likewise suffer, is not to be approved of.

(1) L. 1. S. 3. ff. de poen. L. 4. C. de serv. fugit. Gener. Ordonn. of 28 Aug. 1749. Art. 4. Public. 2. Mar. 1751, et 23 Jan. 1753.

(2) This observation is entitled to some weight against the introduction of the punishment of the guillotine. Even in this a distinction is already made in the case of great malefactors, by causing them to put on a red shirt.

(3) Resol. Holl. 1 May 1732, but see further, the Gr. Pl. Boek. VI. D. pag. 577. VII. D. pag. 844 et IX. D. pag. 458, 459, 460, et 462.

SECT. IV.

It is a general rule that *where there is no crime there can be no punishment*, therefore in apportioning the punishment the judge ought, in the first place, to attend to all that has been said in the preceding chapter respecting the nature and degrees of crimes. In order to render the punishment affixed by the law to the offence perfectly appropriate, the crime must have been committed intentionally, and if the crime has not been completely, but only partially committed, the ordinary punishment of the law is not applicable.⁽¹⁾

Rules in
affixing
punish-
ments:

Another rule is, the *punishment of the crime can only be inflicted upon the party who has committed it and his accomplices*.⁽²⁾

Thus parents are not punishable for their children, nor masters for their servants, unless proved to be accomplices.⁽³⁾ Heirs are not answerable for the crimes of those to whose inheritance they have succeeded.⁽⁴⁾ They are liable, however, for pecuniary fines or mulcts already imposed by the court, or respecting which a process is already pending, in case the

(1) Quistorp, S. 83.

(2) L. 22. C. de pœnis.

(3) Regtsgel, Observ. over. De Groot's Inleid. 1 D. Obs. 75.

(4) L. 26. ff. de poen.

Rules in
affixing
punish-
ments.

party condemned happens to die before payment.⁽¹⁾

When any one has committed several crimes, a distinction must be made whether they are of different or the same nature. In the first case, all those special punishments should properly take place which the law has affixed to each offence respectively, so far as they may follow each other.⁽²⁾ However it is most usual in such case to substitute a heavier corporal punishment in place of all the other special ones.⁽³⁾ In case any one commits a crime subjecting him to corporal punishment, and afterwards another which is capital, it is clear that the latter supersedes the former, although in this case a severer kind of capital punishment may be inflicted. When any one, by the commission of several crimes, has become subject to several corporal punishments, which cannot all be inflicted at the same time, the heaviest must be chosen; but capital punishment can by no means be inflicted instead of all these corporal punishments together. If the several crimes are all of the same nature, we must consider whether the law has affixed to this repetition of the same offence a special punishment; if so,

(1) L. ult. C. si reus vel accus. mort. fuer.

(2) Boehmer ad Carpzovii Prax. Crim. Quæst. 132. Obs. 1.

(3) L. 17. C. de pœnis.

this must be followed, if not, then the ordinary punishment should be inflicted, which, however, under aggravating circumstances, may be rendered somewhat severer.⁽¹⁾

Rules in
affixing
punish-
ments.

If the same crime has been committed by several persons, these, with respect to the contribution in damages, constitute, according to the expression of the old law, *one guilty person*;⁽²⁾ but in the allotment of the punishment (if the circumstance of being accomplices in the same plot makes no difference) each must answer for his own acts.⁽³⁾

In cases of crimes of great magnitude, in regard to which it is necessary for the public safety to create a general feeling and terror, it has sometimes been customary to execute the malefactor in effigy;⁽⁴⁾ but this is seldom done at present. Of this nature also is the practice of affixing the names of deserters on the gallows, the better to deter others.⁽⁵⁾

The infliction of punishment on the dead bodies of criminals is a relic of the barbarous ages.

(1) Quistorp, S. 88-90.

(2) De Groot, Inleid. 3 B. 34 D. S. 6. Regtsgel, Observ. 2 D. Obs. 89.

(3) L. 22. C. de poen. L. ult. ff. ad Leg. Corn. de sicar. Boehmer ad Carpzovii Prax. Crim. Part. 1. Quæst. 25. Obs. 1. Tom. 1. pag. 158.

(4) Putman, Advers. Jur. Lib. 1. Cap. 14: Lib. 2. Cap. 25.

(5) Feltman, Articul-brief, pag. 255.

Rules in
affixing
punish-
ments.

This is not now exercised beyond the burying them in those places usually assigned for the interment of malefactors.⁽¹⁾

SECT. V.

By what
law pu-
nishments
are to be
regulated.

In the punishment of crimes, the laws of the place where the crime has been committed must be followed, although the party may be apprehended and proceeded against elsewhere.^{(2)*}

When the law does not determine the punishment of a crime begun, but not entirely completed, in determining the punishment, the extent to which the attempts or efforts of the

(1) Boehmer ad Carpzovii Prax. Crim. Part. 3. Quæst. 131. Obs. 3.

(2) Voet, ad tit. ff. de poen. n. 11.

* Query—If an Englishman who committed an offence abroad, as in Portugal, be tried in England, under a Special Commission, pursuant to Statute 33 Henry 8, ch. 23, and convicted, and supposing a punishment to be annexed to the offence by the law of Portugal different from that which is annexed to it by the law of England, which punishment should be inflicted?

Leyser, in his *Meditationes ad Pandectas*, is of opinion, that in such case the law of the place where the act was committed should be followed; and he cites the case of a man fleeing from one jurisdiction to another, in order to oust the judge of the place of his jurisdiction, to secure a milder punishment.

By 43 George 3, ch. 113. s. 6. this act is extended to the case of accessories before the fact in the case of murder, and to the crime of manslaughter.

See also Act 13. Geo. 3. ch. 63., by which, misdemeanors committed in India may be tried in England.—T.

party to effect his purpose have succeeded, must be attended to, and according to this and the proof of his intention, a punishment different from the ordinary one is adjudged.⁽¹⁾

By what law punishments are to be regulated.

SECT. VI.

No judge is at liberty to alter, mitigate, or aggravate the punishment affixed by the law to any offence, and which is clearly applicable to the case, unless the law has left him a discretion in this matter, or the special circumstances of the case afford lawful grounds so to do.⁽²⁾ The exercise of this discretion is permitted in the following cases:—When the evident object of the punishment appointed by law to the offence would not be attained by its infliction:—When it is impossible, or at least very difficult, to inflict the prescribed punishment personally on the malefactor:—When the grounds of the law itself are doubtful and obscure:—When the inflicting of the punishment on the guilty person would be highly prejudicial to others and innocent persons:—When the state or condition of the person to be punished makes a departure from the law in this respect necessary.⁽³⁾—When the punishment is left to the discretion of the judge, and the offence is not of a grave nature,

Discretionary punishments.

(1) Quistorp, S. 96 et 97.

(2) L. 11. pr. ff. de pœnis. L. 15. C. eod.

(3) Quistorp, S. 99.

Discre-
tionary pu-
nishments.

he is then at liberty, according to the circumstances of the case and of the person, to alter the punishment ; and instead of imprisonment, or any infamous, or even corporal punishment, to impose a fine or the like. This discretionary power of altering the punishment is permitted when the law is not sufficiently precise on this head, or when on account of some evidence of a particular nature, it is a question whether the punishment prescribed by the law is clearly applicable to the case. This discretion of the judge, however, is not of a wild or capricious nature, but has its limits, within which it must confine itself.⁽¹⁾ Therefore, among other things, the judge must observe how the like crimes are usually punished according to the laws and customs of other tribunals. Such discretionary punishments are confined, also, as to their utmost extent, to those of a corporal nature, and cannot be extended to capital punishments, although the frequent commission of the crime, the welfare of the state, and other weighty reasons, may appear to render it necessary ; since in all such cases, applications, stating those reasons, should be made to the legislature, whose authority and sanction the judge must previously obtain for the proposed purpose.⁽²⁾

(1) L. 78. L. 79. L. 80. ff. pro. socio.

(2) Quistorp, S. 100 et 101.

SECT. VII.

The reasons which may weigh with the judge to mitigate the punishment, seem, however, to merit a particular inquiry. In general, we may say that they are to be deduced from the greater or less degree of the immorality of the action and its consequences.⁽¹⁾

Reasons
for mitiga-
tion of pu-
nishment.

This mitigation of punishment is mostly obtained by the party, by his offence being declared *civil* and *compoundable*, or by his being received *in submission* on the plea of guilty, of which we shall have occasion to speak hereafter. *Compensation* is not admissible in criminal cases, except in those of *Defamation* and trifling offences.⁽²⁾

Repentance shown for a crime contemplated, but not wholly accomplished, or else immediately after its accomplishment, may serve as proof of a trifling degree of evil intention, particularly when coupled with other favourable circumstances, such as immediate compensation for the injury; all which afford grounds for mitigation of punishment. However, on this head, it must be carefully considered whether this repentance does not come under the

(1) C. J. Heils, *Judex et Defensor in Processu inquisit.* Cap. 6. pag. 335-546.

(2) L. 36. ff. de dol. mal. L. 39. ff. sol. matr.

Reasons
for mitiga-
tion of pu-
nishment.

description of repentance *at the foot of the gallows* (Galgenberouw), as it is termed; and arise more from the fear of punishment than the love of virtue, and which, in grave crimes, and already completed, is of no avail.⁽¹⁾

The age of the criminal (if he is not, on account of dotage, to be classed among insane persons) is of itself no reason for mitigation of punishment, since aged persons ought to estimate the morality of their actions more accurately than young persons. However, advanced age, and the infirmities attendant thereon, come very much into consideration with respect to the sort of punishment to be inflicted, particularly in those of a corporal nature, and therefore it is very frequently confined to imprisonment.⁽²⁾

The weakness of females furnishes also sometimes a reason to affect them with a milder sort of punishment than men, unless the case concern the public safety, or be an act of great personal violence, which is the less pardonable in women.⁽³⁾ When the woman is pregnant, no capital punishment can be inflicted till after her delivery, nor even a corporal punishment,

(1) Leyser, *Medit. ad ff. T. 10. Spec. 645. Th. 7 et 8.*

(2) Boehmer *ad Carpzovii Prax. Crim. Part 3. Quæst. 144. Obs. 1.*

(3) Quistorp, *S. 108.*

which in this case is altered as far as possible for some other commensurate with the offence.⁽¹⁾

Reasons
for mitiga-
tion of pu-
nishment.

A bad education, and the consequence imperfect conception of good and evil, may, when the crime is not of a heinous nature, and there are no aggravating circumstances, and there is ground to hope for the reformation of the offender, be considered as favourable to mitigation.⁽²⁾

Previous good conduct, and the circumstance of the party's having been seduced to do the act in question by others, if satisfactorily proved, and no great degree of evil intention appearing, may be favourably considered by the judge in cases not of a grave nature; but if the party thus seduced has already attained the age of manhood, and continued to give ear to these evil counsels, and has under the influence thereof proceeded to the commission of the crime, then he cannot avail himself of this extenuation of his offence.⁽³⁾

Sickness may operate to stay the execution of the sentence, but not to effect any alteration in it, unless the sickness be of such nature as not to admit of corporal punishment without manifest danger to the party.⁽⁴⁾ The question whe-

(1) L. 3. ff. de pœnis. L. 18. ff. de stat. hom.

(2) Quistorp, S. 109.

(3) Quistorp, S. 110.

(4) Quistorp, S. 111.

Reasons
for mitiga-
tion of pu-
nishment.

ther *long confinement before trial* should operate in mitigation of the sentence, requires some distinction in considering it. If the term of imprisonment has been of unusual duration, without the fault of the party, and the crime be not of a capital nature, this furnishes not only a reason for mitigating the sentence, but sometimes, in trifling cases, this imprisonment is considered as the whole or part of the punishment. But in capital cases, the length of the previous imprisonment does not avail the prisoner.⁽¹⁾

Further, among the reasons for mitigation of punishment may be mentioned the intercession of the prosecutor himself, or party injured : or that the prisoner is a person of great *talents or acquirements* : or that he has a numerous family : or that he has *voluntarily confessed his crime* : that the offence, although not yet barred by prescription, has, however, been committed long since : that the prosecutor or party injured, has himself been the first cause of the crime ; and such like : but it is manifest that to determine whether such excuses are lawful and well-founded, we must consider the nature of the offence with all the concurrent circumstances, when the weight or futility of such excuses

(1) L. 25. ff. L. 23. C. de pœnis. Leyser, Medit. ad Pand. Tom. 10. Spec. 645. Th. 12. Boehmer ad Carpzovii Prax. Crim. Part 3. Quæst. 149. Obs. 2.

will be very easily determined by a discerning judge.⁽¹⁾

Reasons
for mitiga-
tion of pu-
nishment.

SECT. VIII.

Having thus far treated of crimes in general, and their punishments, we must now proceed to the consideration of the particular species of crimes ; and, for the sake of order, they may be classed under the following principal heads :—

Classifica-
tion of
crimes.

1. Crimes against religion.
2. Crimes against the state and public safety.
3. Crimes against the life, or person, or honour of our fellow-men.
4. Crimes against their property.
5. Crimes arising from incontinency or lewdness.

(1) Quistorp, S. 113-117. b.

CHAPTER III.

Of Crimes against Religion.

SECT. I.

Of these
crimes in
general.

THE further we go back to the ages of ignorance, superstition, extravagant sectarian zeal and intolerance, the greater and more extensive we find this class of crimes.⁽¹⁾ In proportion to the progress of civilization and moderation has this list of offences been diminished.

Those unhappy times when heretics were persecuted with a barbarous Inquisition, and persons even put to death as *sorcerers*, are past; and all this class of cases, as not being fit matters of judicial cognizance, are withdrawn from the tribunals, in so far as they do not directly disturb the peace, or affect the safety of the state: in which case they certainly are still subject to discretionary correction and punishment.⁽²⁾

We, therefore, in speaking of crimes against religion, confine ourselves to two sorts—*Blasphemy and Perjury*.

SECT. II.

Blasphe-
my.

Blasphemy.—By this we understand all such

(1) Damhouder, Prax. Rer. Crimin. Cap. 61.

(2) Montesquieu, l'Esprit des Loix, Liv. II. Chap. 4.

words or actions, whereby any one contemns or reviles the Supreme Being.⁽¹⁾ Blasphemy.

Under this head may be reckoned the intentionally spreading or circulating the disbelief of the existence of a Supreme Being who governs the universe :—the contemptuously ascribing to God such acts as are inconsistent with his attributes :—the uttering of curses against God, and publicly blaspheming him :—the mocking, and more particularly the disturbing of public divine worship, &c. From the nature of this crime, the chief thing to be considered is how far it was the intention of the party to treat the Deity with irreverence, and the reasons for mitigating punishment in other cases are of considerable avail in this.⁽²⁾

The punishment of this crime in former times extended to capital and very severe corporal punishment; for example, the piercing the tongue with a spike.⁽³⁾ According to the present more moderate way of thinking, and because this crime is considered principally with respect to its influence on the public peace, it is never punished capitally; but the rule now is to punish it at the discretion of the judge, either corporally or by fine or imprisonment.⁽⁴⁾

(1) Meister, Princ. Jur. Crim. S. 433.

(2) Quistorp, S. 126 et 127.

(3) Boehmer, ad Const. Crim. Carol. Art. 106.

(4) Voet, ad tit. ff. ad Leg. Jul. Majest. n. 1.

SECT. III.

Perjury.

Perjury.—This crime is committed when we purposely violate engagements entered into by us under oath, or when we premeditatedly, to the prejudice of a third person, declare, under oath, that to be *true* which we know to be *false*.

The latter sort of perjury is certainly a greater crime than the former, and in general this crime is greater or less, according to the degree of wickedness or cupidity which has served as the motive, and the greater or less mischief from the consequences.⁽¹⁾

According to our oldest laws, perjury was punished by branding the face with a hot iron,⁽²⁾ or by cutting off the joints of the forefingers.⁽³⁾

But these punishments by mutilation of the body are now obsolete, and in their place is substituted whipping, imprisonment, banishment, &c.⁽⁴⁾ The taking a false oath is, with reason, considered as a heinous offence. The bad intention thereby is so evident, and the mischief to society so incalculable, that it is the duty of the judge to deal seriously with this offence, and not with a light hand.

(1) Boehmer, ad Const. Crim. Carol. Art. 107.

(2) Keuren van Zeeland, Cap. 4. Art. 11.

(3) J. V. D. Eyck, Handv. van Zuidholl. pag. 199.

(4) Voet, ad tit. ff. de jurejur. n. 32. Sentence of the Supreme Court in the cause of the Procureur General v. Marijje, Blanken, 15 Oct. 1756.

CHAPTER IV.

Of Crimes against the State and Public Safety.

SECT. I.

UNDER this head of crime may be classed *high treason, treason, coining, public rioting, violence, arson, extortion, or concussion, and bribery, or corrupt purchasing of public offices.* Different species of this crime.

SECT. II.

1. *High Treason, or the Crimen Perduellionis.* High treason.
This crime is committed by him who with an *hostile intention*⁽¹⁾ disturbs, injures, or endangers the independence or safety of the state; for example, to bring the state under subjection to a foreign power; the treacherously surrendering of fortresses, towns, or other possessions of the state;—the revealing the secrets of the state with an hostile intention;—the favouring or assisting the enemy in time of war to the prejudice of the state;—the confounding with an hostile intention, the boundaries of the state.⁽²⁾

High treason may be committed by any inhabitant of the state, or person who resides therein

(1) Boehmer, ad Const. Crim. Carol. Art. 124. S. 5.

(2) Projet of a new Code of Criminal Law, Chap. 2. Sect. 1. Art. 2-20.

High treason.

for a time.⁽¹⁾ Any one who is apprised of an act of high treason is bound to disclose it, or is otherwise subject to punishment.⁽²⁾

The punishment of this crime of high treason is generally *death*, of which the manner and mode of execution is usually regulated by the circumstances of the case.⁽³⁾

SECT. III.

Treason.

2. *Treason, or Crimen læsæ Majestatis.* This so far agrees in its nature with high treason, that it is also committed by acts which affect or endanger the security of the state, though it differs in this, that to constitute treason it is not necessary that the act be done with an *hostile intention*, which is absolutely necessary to constitute the crime of high treason.⁽⁴⁾

It is evident that the punishment of this offence can seldom be capital, but that it varies according to the greater or less criminality of the intention of the party, the mischief occasioned by the act, and the different quality or condition of the parties, and may therefore be either the waving of the sword of the execu-

(1) Voet, ad tit. ff. ad Leg. Jul. Majest. n. 4.

(2) Voet, ad d. t. n. 11. Boehmer, ad Carpzovii Prax. Crim. Part 1. Quæst. 41. Obs. 9.

(3) Voet, ad d. t. n. 6.

(4) Boehmer, Elem. Jur. Crim. Cap. 5. S. 72.

tioner over the head of the offender, imprisonment, banishment, &c.⁽¹⁾ Treason.

SECT. IV.

3. *Coining*.—This crime is committed in various ways.

1. By counterfeiting and imitating the coins of the realm, by pieces which have not the proper legal value.

2. By diminishing the value of the current coin of the state; for instance, by clipping, filing, or washing it with *aqua fortis*, &c.

3. By making, of one's own authority, pieces in imitation of the coin of the country, even if they should have the same intrinsic value.

4. By melting, breaking, or exporting, contrary to law, the current coin of the state.⁽²⁾

According to the nature of these different species of offences, and their different consequences to society, the punishment is lighter or heavier.

However, coiners who have been guilty of this crime in its fullest extent, are punished with us by death.⁽³⁾

(1) Quistorp, S. 158.

(2) Ontwerp van het Lijfstraffelijk Wetboek, 4 Hoofdst.

(3) L. 2. C. de fals. monet. Voet, ad tit. ff. ad Leg. Corn. de fals. n. 8. No one who at all considers the incalculable injury done to the state by this crime can think the punishment of death too severe, and when we consider its effect in a com-

Coining.

Those who are only guilty of clipping, defacing, or the lesser sorts of adulteration of the coin, are sentenced to corporal or other punishment, according to circumstances.⁽¹⁾

The counterfeiting or falsifying of state papers, such as public bonds, redeemable annuities, and other government securities, is not without reason, on account of its pernicious consequences to the state and the inhabitants, punished with death, the same as coining is, unless, from some favourable circumstances in the case, it is commuted for corporal, or some other extraordinary punishment.⁽²⁾

SECT. V.

Sedition.

IV. *Public Tumult or Violence*.—In the first place, under this head of crimes, we must rank the crime of *Sedition*. That is, the committing acts of violence and force, by which the public order and tranquillity is endangered, and the authority of the public officers and magistrates attacked or set at defiance.⁽³⁾

mercial country, this opinion receives additional force. Our attention therefore was not a little excited by the circumstance, that the framers of the *Projet* of the new Criminal Code should have considered mere corporal punishment as sufficient in this case.

(1) Voet, ad d. t. n. 8.

(2) Ontwerp van het Lijfstraff. Wetboek. 5 Hoofdst.

(3) Boehmer, ad Const. Crim. Carol. Art. 127. S. 1.

As this offence may be committed by divers acts and ways, so is the punishment also various. Sedition.

In very grave cases it may be death, though it mostly is limited to corporal punishment, imprisonment, or banishment.⁽¹⁾ In times of political trouble, when these commotions are at the highest, the government generally provides against them by special laws, wherein the punishment is declared. Of these there are repeated instances in our times.⁽²⁾

As, however, this crime frequently originates in the different opinions entertained by men respecting the government of the state, particularly when it has been disturbed by political changes and revolutions, there is scarcely any offence in regard to which it more behoves the judge to exercise the greatest prudence, to the end that as on the one hand he may preserve and maintain peace and good order, so on the other he may not, through excessive severity, render any one the unfortunate victim of political dissensions.

SECT. VI.

This crime of violence is committed, not only by sedition, but by all those acts which have Crime of force and violence.

(1) Boehmer, d. l. S. 3. Quistorp, S. 183.

(2) We may see a number of publications of this nature in the Gr. Pl. Boek, 9 vol. 3 B. 4 tit. To these add the publications of 4 March 1795, 1 March 1797, 1 Nov. 1798, and others.

Crime of
force and
violence.

for their object an unlawful disturbance of the public peace and security, or a forcible invasion of the rights of others.⁽¹⁾

In this more extended sense it is usual to divide it into *public and private violence*; and this is estimated according to the persons against whom, the places in which, and the means with or by which it has been committed.⁽²⁾ The nature of the offence renders it impossible that the same punishment can be applicable at all times, and to all cases; it is, therefore, of a discretionary nature, and regulated according to the enormity of the offence, and the way in which it has been committed,⁽³⁾ and there may be cases in which it may be punished even with death; for instance, for stopping and plundering the post or mail.⁽⁴⁾ There are others, again, for which a slight punishment or correction is held sufficient.

SECT. VII.

Escaping
from
prison.

Under this head, also, may be classed the offence of assisting prisoners to escape, or re-

(1) Matthæus, de Crimin. Lib. 48. tit. 4. Cap. 1. n. 3.

(2) Pothier, in Pand. Justin. ad tit. ff. ad Leg. Jul. de vi publ. et priv.

(3) Groenewegen, de Legib. abrog. ad S. 8. Inst. de publ. Jud.

(4) Plac. Gener. 6 Decemb. 1646, in the Gr. Plac. Boek, D. 1. pag. 527.

leasing them. The worst of these cases is when it is purposely done by the gaoler or keeper of the prison, and the prisoner is a person of consequence, in which case he may be punished, even with death.⁽¹⁾ Escaping from prison.

But if the escape has been occasioned merely by the inadvertence and negligence of the keeper, then the punishment is discretionary, and proportioned to the circumstances of the case.⁽²⁾ If the escape has been effected by means of a third person, it must be considered whether it was accompanied with sedition, or any, and what kind of violence, and according to circumstances the punishment is lighter or heavier.⁽³⁾

If the prisoner has himself effected his escape, then a distinction is with reason made, whether he was only committed for trial or for punishment. In the former case the escape is merely punished with some correction, in addition to the punishment of the offence: in the latter the escape is punished as a separate offence; commonly by extending the term of imprisonment, whipping, and the like, unless the great-

(1) Boehmer, ad Const. Crimin. Carol. Art. 180. S. 1. Voet, ad tit. ff. de cust. et exhib. reor. n. 8.

(2) Leyser, Medit. ad Pand. Tom. 8. Spec. 564. Th. 8. seqq.

(3) Boehmer, ad d. Art. 180. S. 4. Quistorp, S. 193.

Escaping
from
prison.

ness of the violence used in effecting the escape require severer punishment.⁽¹⁾

SECT. VIII.

Arson.

Arson.—This crime is committed when any one wilfully and maliciously, and with the view to injure others, has laid fire to buildings or other immoveable property, whereby the same has caught fire, and damage has been occasioned thereby.⁽²⁾ In judging of the degree of guilt of this offence,⁽³⁾ we must consider :

1. The greatness of the danger ; for example, when a whole town or quarter is thereby put in danger of being burnt down, the crime is greater than when the fire has been set to a remote and separate building.

2. The object of the incendiary, although the consequences have not effected his intention.

3. Circumstances of aggravation, as when the building has been set fire to, with intent to rob or murder, which in our old law is termed *moordbrand*,⁽⁴⁾ in such case the crime is greater than when it has been committed from a spirit of revenge, or design of doing damage to another.

(1) Voet, ad d. tit. ff. n. 9. Quistorp, S. 194.

(2) Quistorp, S. 196.

(3) Boehmer, ad Const. Crim. Carol. Art. 125.

(4) V. D. Wall, Handv. van Dordrecht, 1 St. pag. 202. Handv. van Vlaardingen, pag. 36.

The punishment of wilfully setting a house on fire is in our country death, by strangling and scorching, and in a very aggravated case, by burning alive.⁽¹⁾ In the case of fire occasioned through negligence, this does not amount to arson, but is punished at the discretion of the judge, according to the degree of negligence, besides the obligation to make good the damages.⁽²⁾ Arson.

SECT. IX.

Extortion or Concussion is committed when any person in office, does by abuse thereof, and of his authority, either by pretence of an order from his superior, or by threats or menaces, with a view to his own personal interest and advantage, induce or compel another to submit to what he demands.⁽³⁾ Such persons are real pests to society, and deserve the severest punishment. The correction of this offence is discretionary, and besides restoring what has been extorted, consists generally in the privation of office, fine, imprisonment, and the like.⁽⁴⁾ Extortion or concussion.

Against extortion by military persons, provision is made by various express laws.⁽⁵⁾

(1) Voet, ad tit. ff. de incend. ruin. naufr. n. 5.

(2) Quistorp, S. 203 et 204.

(3) Putman, Elem. Jur. Crimin. S. 194.

(4) Meister, Princ. Jur. Crimin. Sect. 2. Part. 2. Cap. 19. S. 222-225.

(5) Voet, ad. tit. ff. de concuss. n. ult. in fin.

SECT. X.

Corrupt
purchasing
of offices.

The Corrupt Purchasing of Offices is when, by unlawful or forbidden means, any one endeavours to obtain a dignity or office. With us almost all persons appointed to any office are required, before they are admitted, to take the *Oath of Purification*,⁽¹⁾ and particularly in this sense, that in the exercise of their office they will not suffer themselves to be bribed by any gifts or presents. If they violate this oath they are subject to the penalties of perjury.

(1) Voet, ad tit. ff. de Leg. Jul. ambit.

CHAPTER V.

Of Crimes against the Life, the Person, and the Honour of our Fellow-Men.

SECT. I.

THE crime against life consists in homicide, Homicide.
that is, the act whereby we unlawfully and violently deprive one of our fellow-creatures of life. With respect to this crime several things deserve to be seriously considered, which we shall therefore treat of in the way of question and answer.

SECT. II.

On whom may homicide be committed?

On all persons that have life, without distinction of age or sex ;⁽¹⁾ even upon those who are already dangerously ill,⁽²⁾ but not on monsters or deformed births, whom it is the custom to smother, but not till after notice to the magistrate.⁽³⁾ But most assuredly the slaying of insane persons, malefactors, or heretics, &c. amounts to homicide.⁽⁴⁾ It is enough that we have de-

On whom
it may be
commit-
ted.

(1) L. 1. S. 2. ff. ad Leg. Corn. de sicar. Leyser, Medit, ad Pand. Tom. 9. Spec. 597. Th. 5.

(2) Boehmer, ad Const. Crim. Carol. Art. 137. S. 2.

(3) De Groot, Inleid. 1 B. 3 D. S. 5. Regtsgel. Observ. 1 D. Obs. 7.

(4) Boehmer, d. l.

On whom
it may be
commit-
ted.

prived a fellow creature of life, whatever may be his state or condition in civil society.

SECT. III.

By whom.

By whom may homicide be committed?

By all those who are the moral cause of the violent death of another, although they may not literally have committed an actual murder.⁽¹⁾

Thus homicide may be committed when we withhold from another those necessities which are indispensable to life, which we are bound to furnish, and thereby occasion his death; and in general when any act is the immediate cause of the death which follows, we are guilty of homicide.

SECT. IV.

Mortal
wounds.

What is the law with respect to the inflicting of mortal wounds?

In the case of violent homicide the question turns not so much upon this, that the wounds inflicted have led or given occasion to the death which follows, as that in them is to be found the only and true cause of the subsequent death.⁽²⁾

Whether a wound be mortal or not, is not merely to be determined from the nature of the instrument used; for a blow with the fist may

(1) Boehmer, ad d. Art. S. 1.

(2) Quistorp, S. 219.

be mortal;⁽¹⁾ but the question here is in what place and in what way the wound was inflicted.⁽²⁾ Mortal wounds.

If every person, or even a person of the same habit as the deceased would, according to the common course of nature, have died therefrom, then is such wound perfectly mortal, and the party is guilty of homicide. If the wound is only *mortal by accident*, that is, not perfectly so by its nature, but so by fortuitous circumstances arising after the wound, then, in such case, we must examine into the nature of the accident; for example, great loss of blood, fever, convulsions, mortifications, or similar accidents, which have not been occasioned by the obstinacy or perverseness of the wounded person or patient; these furnish no excuse for homicide; but the case is otherwise when the wound was not of itself of a mortal nature, but the party by his own wilfulness and obstinacy has brought these symptoms on himself, and thereby occasioned his subsequent death.^{(3)*}

(1) L. 7. S. 1. L. 27. S. 23. ff. ad Leg. Aquil.

(2) With respect to the difference between those wounds which are mortal absolutely and *per se*, and those which are only accidentally so, see the writers on *Medical Jurisprudence*, as Ludwig, Hebenstreit, Plenck, Schlegel, and others.

(3) Quistorp, S. 220.

* The Author here makes a just distinction, in order to avoid the too common fallacy of "*Post hoc, ergo propter hoc.*"—T.

Mortal
wounds.

When the party has lived several days after the wound, say *nine* days, this does not of itself qualify the wound as accidentally mortal, but tends, with other concurrent circumstances, to ground the presumption that the wound has given occasion to, but not caused the death.⁽¹⁾

SECT. V.

Wilful and
premedi-
tated
homicide.

The next question is, how many kinds of homicide are there?

Homicide is of three kinds. Homicide by *malice aforethought, or prepense*: homicide by *imprudence, or want of thought*, and homicide by *accident*.

The magnitude of the crime consists in the greater or less degree of premeditation with which it is committed ; in the clear knowledge of the heinousness of the crime and its consequences ; in the particular relation of the offender to the deceased, and in the reason which might or ought to have withheld him from the commission of the crime.

Premeditated homicide is either *qualified* or *not qualified*. This qualification is determined by the circumstances of the place and time of the act, the condition of the deceased, and the special relations of the offender to him, the cruelty of the manner in which the deed has been perpetrated, and the degree of

(1) De Groot, Inleid. 3 B. 34 D. S. 8. Regtsgel. Observ. 1 D. Obs. 93.

2. A great and actual danger. cunning and malice with which it has been planned. Such a *qualified* homicide is termed a *murder*.⁽¹⁾

Wilful and
premedi-
tated
homicide.

Malice prepense, or evil intention in a homicide, is held as proven when a person having determined to commit a murder, accomplishes it in the way and manner he had previously meditated; when a person having assaulted another violently by night, or in the dark, has by repeated blows, in dangerous parts of the body, caused his death; when the whole conduct of the murderer evinces his wicked intention to commit murder; when he has directed his blows principally against the head or other mortal parts.

To constitute homicide a *direct* design is not always necessary. An *indirect* object is also sufficient, as when any one has assaulted another with the intent to wound him, and this wound, however contrary to the direct intention of the party, occasions death.⁽²⁾

SECT. VI.

An Homicide by Imprudence takes place when there is no intention, direct or indirect, to kill; but however an act is committed, which, had there been sufficient caution, might have been avoided.⁽³⁾ For instance, when being employed

Homicide
by impru-
dence.

(1) Quistorp, 8. 221.

(2) Boehmer, ad Const. Crim. Carol. Art. 137. S. 4-7.

(3) Quistorp, S. 224.

Homicide
by impru-
dence.

or occupied with something, we proceed in so careless a manner as to be the occasion of another losing his life ;⁽¹⁾ when we keep wild beasts, accustomed to attack and kill people ;⁽²⁾ when in jesting with any one, or correcting him, we exceed the bounds of moderation, and thereby occasion his death ; when by carelessly throwing or cutting any thing down, we kill any one ; when, although unlawfully assaulted, we exceed, without necessity, the limits of self-defence ;⁽³⁾ when, in consequence of injurious acts and expressions of the deceased, without cause on our part, we have given way, without restraint to our passion ; and in general, when we might have previously foreseen that the act we were about committing would be prejudicial to the health or life of another.

Although the imprudence which occasions the violent death of another, admits of various degrees of distinction, and thus in one case is much more deserving of punishment than in another, yet, homicides of this nature are never judged according to the rules which prevail in cases of premeditated homicide, and therefore never punishable with death.⁽⁴⁾

(1) L. 31. ff. ad Leg. Aquil.

(2) Boehmer, ad Const. Crim. Carol. Art. 136.

(3) Boehmer, d. l. Art. 142.

(4) Quistorp, d. S. 224.

SECT. VII.

By *accidental* homicide, or chance medley, is understood such deaths as are occasioned neither by design nor by the carelessness of the party, but by pure accident, which nobody could suspect. When these circumstances concur, there is no crime to punish ; but this case is extremely rare, for there generally appear some signs of imprudence.⁽¹⁾

Accidental
homicide,
or chance-
medley.

SECT. VIII.

What is the Punishment of Homicide ?

When this crime is premeditated, or wilfully committed, the punishment, according to divine and human law, is death :⁽²⁾ the nature of which is regulated by the circumstances of the case, as they are of a mitigating or aggravating nature.

Punish-
ment of
homicide.

Homicide through carelessness, and without *malice prepense*, is punished with an *extraordinary*

(1) Boehmer, ad Const. Crim. Carol. Art. 46.

(2) Deduction in Revision on the part of the head Officer of Amsterdam contra J. B. F. Van Goch. Art. 250-320. Is it possible that any one can still entertain a doubt as to the propriety of punishing with death such an offence ? Yet the magistrates of Rotterdam in the year 1798 expressed some doubts ; but these were briefly refuted in a memorial of the court of justice of Holland, inserted in the resolution of the First Chamber of the Representative Body, after the date of the 16th August, 1798.

Punish-
ment of
homicide.

punishment, proportioned according to the degree of carelessness.⁽¹⁾

When a homicide has been committed by several persons who have united for this purpose, and co-operated together, they are all punishable with death.

If it has been committed in the presence of several, who were all parties in the fray, then he only who inflicted the deadly wound is punished capitally, the others are subject to discretionary punishment. The punishment is also discretionary when it cannot be discovered who has given the wound.⁽²⁾

The reasons for mitigating the punishment in cases of homicide are easily to be collected from the general rules we have already given on this head.⁽³⁾ We may also add the case when medical men differ with respect to the wounds being mortal or not, or that the party has lived so long after the infliction of the wound that we may with reason doubt as to its being mortal.⁽⁴⁾

SECT. IX.

Homicide
in self-
defence, or
justifiable
homicide.

What is Homicide in Self-Defence?

When we kill or slay another in defence of our own life or person. This defence requires,

1. An unexpected and unjust assault.

(1) Voet, ad tit. ff. ad Leg. Corn. de Sicar. n. 9.

(2) Boehmer, ad const. Crim. Carol. Art. 148.

(3) See p. 307 et seqq.

(4) Quistorp, S. 235.

3. The impossibility of otherwise defending or saving our own life than by taking that of the other.⁽¹⁾

Homicide
in self-
defence, or
justifiable
homicide.

The killing another in defence of our honour does not properly come within the principle of justifiable homicide; unless, perhaps, in the case of persons to whom flight would be ruin to their worldly welfare.⁽²⁾ That a maid or unmarried female, having no other means of defending her honour against a ravisher may kill him in the attempt to force her, admits of no doubt.⁽³⁾ Homicide in defence of our property against a thief may sometimes be considered as justifiable homicide, as when he could be prevented by no other means.⁽⁴⁾ Much, however, in these cases depends on circumstances from which it is to be determined whether the death is to be considered as a homicide through imprudence or not.

Justifiable homicide takes place not only in defence of our own life, but also in defence of the life, the goods, and the honour of our wives, children, friends, and relations, and in general in defence of any one who is assaulted unlawfully and dangerously.⁽⁵⁾

(1) Boehmer, ad Const. Crim. Carol. Art. 140.

(2) Leyser, Medit. ad Pand. Tom. 9. Spec. 600. Th. 22.

(3) Putman, Elem. Jur. Crim. S. 320.

(4) Putman, d. l. S. 321.

(5) Boehmer, ad Const. Crim. Carol. Art. 150. S. 1.

Homicide
in self-
defence, or
justifiable
homicide.

Since every homicide labours under the suspicion of a previous malicious intention, every one who attempts to justify it as *se defendendo*, must by direct witnesses or proofs, or at least by appearances, deduced from the circumstances of the case, show that he was placed precisely in that situation in which the law allows us to kill another in our own defence.⁽¹⁾

SECT. X.

Murder.

What is murder, and wherein does it differ from every other species of homicide?—This word imports,

1. That some one has been killed, or mortally wounded.

2. That this has been done premeditatedly, and with malice aforethought.

3. That the perpetrator's object has been to derive some profit or advantage thereby.⁽²⁾

To inflict the greater terror, and for the better prevention of this crime, the criminal is generally condemned to be broken on the wheel.⁽³⁾

SECT. XI.

Poisoning.

Among the *qualified* sorts of murder, is

(1) Carpzovii, Prax. rer. Crim. Quæst. 33, ibique, Boehmer, in Observ.

(2) Bohemer, Elem. Jur. Crim. Sect. 2. Cap. 17.

(3) S. Van Leeuwen, Cens. For. Part. 1. Lib. 5. Cap. 12 and 13.

reckoned the destroying of any of our fellow creatures by *poison*. By this we understand all such noxious things which are administered with the object to affect the life of any one.⁽¹⁾ The punishment of poisoners is death, and on account of the artful and insidious design, a heavy punishment is annexed ; for example, the *wheel*.⁽²⁾ Poisoning.

However heinous the nature of this crime, there are yet some circumstances of mitigation, which may be taken into consideration, as when by timely assistance the effect of the poison has been prevented, or when the poison has been prepared, but not taken.⁽³⁾

SECT. XII.

Parricide and Infanticide have at all times been considered as homicides of a very heinous nature. Parricide, in its extended sense, comprehends also the killing of other relations ; which circumstance of the party killed being a relation, always aggravates the crime.⁽⁴⁾ Parricide
and infan-
ticide.

Infanticide or *child murder*, requires that the child be born alive, and after due time.

This is judged of from the state in which the

(1) Leyser, Medit. ad Pand. Tom. Spec. 609.

(2) Boehmer, ad. Const. Crim. Carol. Art. 130. Voet, ad tit. ff. ad leg. Corn. de Sicar. n. 14.

(3) Quistorp, S. 264-266.

(4) Boehmer, ad Const. Crim. Carol. Art. 131. S. 1 et 2.

Parricide
and infan-
ticide.

body of the child is found.⁽¹⁾ Much stress has always been laid on the experiment, whether the child's lungs would float in water, or sink; in the former case, it was held that the child was born alive, in the latter, that it was still-born; and however this proof may tend to exculpate the party, on the one hand, yet on the other hand, it is not sufficiently certain and sure as a proof of guilt.⁽²⁾

Besides actual violence to the child, this crime may be committed by neglect; for instance, by not cleaning it at the birth, but letting it be suffocated from this cause; by withholding from it all kinds of nourishment; by not tying up the navel string, &c.⁽³⁾

Child murder may also be committed, not only on children already born, but also on those still in the mother's womb, when either by violence or by *procuring abortion*, the birth of the child is prevented.⁽⁴⁾

Under this head may also be placed the exposing of young-born children in places where there is danger of their dying for want of help. When this is done with the object of

(1) Boehmer, ad d. Art. 131. S. 3.

(2) P. Camper, on the signs of life and death in new-born children (Leeuw. 1774).

(3) Boehmer, ad Carpzovii Prax Crim. Part. 1. quæst. 9. Obs. 5.

(4) Boehmer, ad Const. Crim. Carol. Art. 133.

causing the child's death, it is an actual murder; but if the child dies without this being the intention of the party, it is a homicide, under the head of imprudence.⁽¹⁾

Parricide
and infan-
ticide.

SECT. XIII.

The punishment of *parricides*, with the Romans, was very severe. The party was sewn up in a sack, with a dog, a cock, a viper, and an ape; left to the fury of these animals, and thus cast into the nearest sea or river.⁽²⁾ With us, this punishment is not in use. But parricides with malice aforethought are broken on the wheel: and when the previous design is not manifest, they are hung or decapitated.⁽³⁾ *Female infanticides* are strangled; but if the death of the child is more owing to imprudence than design, they are subjected to a *milder punishment*, as imprisonment.⁽⁴⁾ The punishment for procuring *abortion* depends much on circumstances, as whether the child was already quickened—what were the means used to procure abortion—whether the mother has

Punish-
ment of
parricide
and infan-
ticide.

(1) Boehmer, d. l. Art. 132.

(2) J. F. Ramos. Errores, Triboniani de poena, parricidii. (L. B. 1728).

(3) Voet, ad tit. ff. ad Leg. Pomp. de parric. n. 4.

(4) Voet, d. l. Boehmer, ad Const. Crim. Carol. Art. 131.

Punish-
ment of
parricide
and infan-
ticide.

done it of herself, or through the inducement of others, &c. ; according to all which the degree of punishment is regulated, and is generally corporal.⁽¹⁾

Such is the case also with respect to the *exposing* of children. If done with the object of causing the child's death, it is actual murder ; and, as such, punished capitally ; but if this does not appear to have been the object, then the act is punished by imprisonment, corporal punishment, or banishment.⁽²⁾

SECT. XIV.

Suicide, or
self-
murder.

Although *suicide* is undoubtedly an unlawful act,⁽³⁾ it is not, however, reckoned among those crimes which are punished publicly.⁽⁴⁾ According to the very old customs of this country, the bodies of self-murderers were dragged on a hurdle, hung on a gibbet, and their property forfeited to the state ; but this custom has long

(1) Boehmer, d. l. Art. 133. S. 7. Seqq. S. V. Leeuwen, Cens. For. Part. 1. L. 5. Cap. 15. n. 5.

(2) Boehmer, ad Const. Crim. Carol. Art. 132. J. Moorman, Verhand, Van de Misdaaden in derzelve Straffen, 2 B. 7. Hoofdd.

(3) J. Dumas, Traité du Suicide. (Amst. 1773.)

(4) With respect to the causes of suicide, medically considered, see L. Auenbrugger, de inwendige razernij. of. drift. tot Zelfmoord, als eene wezentlijke Ziekte beschouwd. (Dordr. 1788.)

been in disuse,⁽¹⁾ and they are only buried privately, and without pomp. Suicide, or self-murder.

SECT. XV.

Under *crimes against the person*, whereof we made mention in the title of this chapter, may be classed *wounding* and *duelling*. Crimes against the person.

In respect to the case where the wound is mortal, we have already treated; but when the *wound is not mortal*, then the offence, besides the liability in damages,⁽²⁾ is according to many local laws of particular towns and villages subject to a fine.⁽³⁾ When, however, the wounding is coupled with aggravating circumstances, it then comes under the head of violence, and frequently subjects the party to discretionary punishment. Wounds.

To check the practice of duelling, several laws have been passed,⁽⁴⁾ particularly the *placaat* of the States of Holland of the 22d of March, 1657.⁽⁵⁾ The substance of which is, Duelling.

1. That no one shall provoke another to a

(1) De Groot, Inleid, 2 B. 1 D. S. 44. Regtsgel, Observ. 2 D. Obs. 23.

(2) See p. 250. *supra*.

(3) S. V. Leeuwen, R. H. R. 4 B. 35 D. n. 2 et 3.

(4) Plac. 1 Julii 1637. G. P. B. 2 D. Col. 458. Plac. 20. Meij 1641. G. P. B. 1 D. Col. 391. Plac. 31. Maart 1684. G. P. B. 4 D. blad. 162.

(5) G. P. B. 2 D. Col. 459.

Duelling.

duel, or when challenged shall accept of it, under pain of privation of office and fine.

2. That the bearers of the challenge, and the seconds, shall be subject to the same punishment.

3. That all persons who have any knowledge of an intended duel are bound to give information thereof.

4. That those who actually fight a duel, and also their seconds, shall be banished from Holland for six years.

5. That the bodies of those who fall in a duel shall be interred without any ceremony in the evening or by night.

6. That if the party killed has been the challenger, his body shall be publicly exposed.

7. That he who kills his antagonist in a duel shall be punished with death without any pardon or remission.

SECT. XVI.

Crimes
against
honour.

Crimes against the honour of our fellow men, otherwise termed *defamation (injuriën)*, generally afford only ground for a civil action for the *amende honorable et profitable*, as we have before mentioned.⁽¹⁾

Simple defamation, or injury to character, is seldom the subject of a criminal proceeding, unless there be aggravating circumstances in

(1) See p. 172. *supra*.

the case to lead to it, as when any one has circulated libels or lampoons, wherein the government or the members thereof are held up to ridicule or contempt ;⁽¹⁾ when the injury is accompanied with acts of violence ;⁽²⁾ or when it is of such a nature that the public peace is thereby disturbed, as in the case of those who wish to take the law into their own hands.⁽³⁾

Crimes
against
honour.

(1) Plac. Holl. 7 Maart. 1754. G. P. B. 8 D. bladz. 570.

(2) Voet, ad tit. ff. de injur. n. 18.

(3) Groenewegen, de Leg. abr. ad S. 1. Inst. de vi bon. rapt.

CHAPTER VI.

Of Crimes against Property.

SECT. I.

Crimes
against
property.

PERSONS guilty of this crime are termed *thieves, robbers, forgerers, public defaulters, prevaricators*, or practitioners who betray their clients, *cheats at play, bankrupts, usurers*. We shall shortly treat of each.

SECT. II.

Theft.

Theft is the taking of any moveable property without the knowledge and against the will of the owner, with a view to benefit ourselves or others.⁽¹⁾

Theft is either simple or compound. Compound, or aggravated* theft, takes place when it is accompanied with breaking in.

When the thief is provided with arms ; when he has been guilty of the offence two or three

(1) Quistorp, S. 341.

* In the Roman law an aggravated offence was termed *Crimen Qualificatum*—sometimes the condition of the party gave it this aggravating quality. Thus, a slave was, for the same offence, punished more severely than a free person. See Report by Translator, p. 42-66, on Criminal Law in force at Demerara, and example there quoted.—T.

or more times; when the property stolen was in Theft.
 an enclosed place,—for instance, fish in an enclosed pond,—fruit in a garden or orchard,—wood in an enclosure,—and destroying the young plants, or cattle from a pasturage; when the theft is committed by servants or inmates to whom the care and custody of the property had been entrusted; when committed by soldiers, watchmen, or guards; when stolen from persons who are occupied at the time in saving their property, as in cases of fire or inundation.

With respect to the *punishment of theft*, it is, by the law in force in Holland, settled,⁽¹⁾

1. That all kinds of theft shall be punished for the first time with whipping and branding; for the second time with whipping, branding, and banishment from Holland and West Friesland; and for the third time with hanging.

2. That thefts accompanied with violence, or house-breaking, shall be punished with hanging.

3. That stealing of cattle, the robbing of mills, the stealing of paling, depredations on sluices or bridges, stealing of ploughs, waggons, and the like, shall be punished with death.

4. That the same punishment shall be inflicted on the purchasers of stolen goods.

(1) Plac. Holl. 16 Dec. 1595. en 19 Maart. 1614. G. P. B. 1 D. Col. 482 et 485.

Theft.

It is, however, true, that custom, confirmed by a number of criminal sentences of the higher as well as the lower tribunals, has, in some degree, mitigated the rigid severity of this law, and that there are many instances of cases of simple theft being punished with mere whipping, and even with less punishment; and of compound theft not being punished with more than severe corporal punishment.⁽¹⁾ Concerning the punishment of stealing of cattle, the practice in this country is not uniform. In some places the law against it is very severe, and it is capital; in others it is subjected to severe corporal punishment.⁽²⁾

SECT. III.

The crime of *robbery* differs in this from *theft*, that it must be accompanied with violence.⁽³⁾

But as there may be great difference in the degrees of violence, it is clear that although a robbery, committed on the highway, or in any one's house, accompanied with violence, deserves death; yet, sometimes, in case of miti-

(1) See on this head certain legal arguments to be found in the letters of F. G. Meijer door Ds. J. Scharp (Rott. 1797) Agter bladz. 128.

(2) Voet, ad tit. ff. de abig. n. 4.

(3) Boehmer, ad Const. Crim. Carol. Art. 126.

gating circumstances, a corporal punishment is held sufficient.⁽¹⁾ Theft.

Among the worst species of robbery, are numbered that of *churches*, and the stealing of *men*, or *kidnapping*.

The *robbery of churches*, or *sacrilege*, is committed on goods or things consecrated to sacred uses, and has place, especially, when alms or money destined for the poor is stolen. Although the superstitious ideas which formerly prevailed with respect to religion, and which were frequently the cause of this offence being punished with unexampled severity, have now given place to a more temperate way of thinking; yet it is certainly an aggravated species of crime, and therefore to be visited, according to the circumstances, with a heavy corporal punishment.⁽²⁾

The stealing of men, or kidnapping, (*plagium*) takes place when we conceal a man, with a view to deprive him of his liberty. The punishment of this offence is generally whipping and branding; nay, in some very aggravated cases, according to the object of the concealment, the punishment of death may be proper.⁽³⁾

(1) Leyser, *Medit. ad Pand.* Tom. 8. Spec. 539. Voet, ad tit. ff. de vi bon. rapt. n. 4.

(2) Quistorp, S. 386-390. Voet, ad tit. ff. ad Leg. Jul. pecul. n. 5.

(3) Voet, ad tit. ff. de Leg. Fab. de plagiar.

SECT. IV.

Falsity and
forgery.

A concealment of the truth, designedly, and which has the effect of injuring another, we term *falsity*, and the persons guilty of it *falsifiers*.

Two things therefore are necessary to constitute the crime of *falsity*.

1. A purposed and criminal intention,⁽¹⁾ which must be fully, or at least to a high degree of probability, proved;⁽²⁾ for, without this object or design, the motive to the act may consist in *error* or *misconception*, which is not punishable.⁽³⁾

2. An actual prejudice occasioned to a third person.⁽⁴⁾

Therefore simple lies, when the two above mentioned requisites are wanting, are not within the cognizance of the criminal law.⁽⁵⁾

Falsity may be committed as well by acts, as by omissions, and as well by words, as by acts and writings.⁽⁶⁾ It is manifest that, according

(1) L. 1. pr. L. 2. L. 23. L. 32. pr. ff. ad Leg. Corn. de fals.

(2) L. 18. S. 1. ff. de probat. L. 20. C. ad Leg. Corn. de fals.

(3) D. L. 20. C. L. 31. ff. eod.

(4) Arg. L. 23. ff. ad Leg. Corn. de fals. Boehmer, ad Const. Crim. Carol. Art. 112. S. 1.

(5) Leyser, Medit. ad Pand. Tom 9. Spec. 594.

(6) Boehmer, Elem. Jur. Crim. Sect. 2. S. 324.

to the measure, or the greater or less degree of malicious intention and of prejudice, occasioned by the act, this crime is susceptible of different degrees of guilt. The counterfeiting or forging of the seals of government, or of corporations, is of a very grave nature, as also forging the signatures of persons in office;⁽¹⁾ and in general the forging of the signatures of private persons also merits, on account of its consequences, the greatest vigilance on the part of the judge. It is almost impossible to enumerate the infinite variety of cases, wherein forgery, or the *crimen falsi*, may be committed.⁽²⁾

Falsity and
forgery.

In an extended sense, we may also include under this offence the intentional frauds committed on the revenue;⁽³⁾ also all those acts which are termed frauds.⁽⁴⁾

In proportion to the different degrees of guilt, which accompany the crime of falsity, is the degree of punishment.

Notwithstanding the Emperor Charles V. has without any qualification fixed hanging

(1) Quistorp, S. 410.

(2) Voet, ad tit. ff. ad Leg. Corn. de fals. n. 6.

(3) This species of fraud is, however, punished by fine, and it is only in case of inability to pay the fine that it is corporally punished.—Gener. Ordonn. 28 Aug. 1749, unless this fraud committed on the revenue is accompanied with another offence, such as perjury, forging of Government passports, &c.

(4) D. D. ad tit. ff. stellionat.

Falsity and
forgery.

as the punishment of this offence ;⁽¹⁾ and there may certainly yet be cases in which the concurrence of aggravating circumstances may justify the punishment of death ;⁽²⁾ yet, by the general rule, the punishment is discretionary, and therefore it is mostly confined to whipping, with or without branding ; imprisonment, banishment, or a fine.^{(3)*}

(1) Edict. 30 Jan. 1545. G. B. B. 1 D. Col. 383.

(2) Boehmer, ad Const. Crim. Carol. Art. 112. S. 6. Boel, Amst. Priv. et Poort. Regt. bladz. 27.

(3) S. V. Leeuwen, Cons. For. Part. 1. Lib. 5. Cap. 6. n. 4. Voet, ad tit. ff. ad Leg. Corn. de fals. n. 4.

• In England the public feeling revolts at the indiscriminate infliction of the punishment of death upon all persons convicted of the crime of forgery, however widely distinguished the circumstances of one case may be from those of another, when morally examined, and appreciated with a view to the motives and consequences of the act.

Yet the mischief remains unremedied, and jurors are left to the painful alternative of imbruing their hands (by a verdict of guilty) in blood, which in their consciences they cannot say ought to be shed, or of violating the sacred obligation of an oath, by a verdict of acquittal.

Nothing but the difficulty of adapting to the principles of English jurisprudence that graduated scale of punishment which, in cases of the "*crimen falsi*," is here recommended by the author to the judges, can, it is presumed, have hitherto prevented the modification of a law so ineffectual for the accomplishment of its direct object, and so mischievous in its collateral consequences.

Impressed with the high importance of the subject, the writer of this note submits, that a salutary reformation of the law of

SECT. V.

The crime of *peculation* is committed when any one, entrusted with the public money, instead

Peculators,
or public
defaulters.

forgery in England may be made by a legislative act, which shall authorise juries, according to the circumstances, to find persons tried for forgery, guilty of that crime, either in the first or in the second degree ; annexing the punishment of death to the crime in the first degree, and the punishment of transportation, or of imprisonment and hard labour, to the second degree ; leaving in the second case the duration of the transportation, or of the imprisonment and hard labour, to the discretion of the presiding judge.

This measure is suggested with the less hesitation, because it is felt to be in analogy with the law of felonious homicide ; for in that case the jury are at liberty, according to the circumstances, to find the prisoner guilty of murder, which is homicide in the first degree, or of manslaughter, which is homicide in the second degree of criminality.

[The Translator is indebted for the above enlightened note, as well as for much other valuable assistance in this work, to his late lamented colleague in the Commission for Enquiry into the Administration of Justice in the West Indies (Mr. Coneys), who had actually, before the dissolution of the Irish Parliament by the Union, framed a bill for the purpose suggested in this note. It may be further observed, as a proof that those penal statutes which grossly offend, by their severity, the natural ideas of proportion in criminal justice, virtually repeal themselves ; and that the two ordinances of the Emperor Charles V., affixing the punishment of death in cases of bankruptcy and forgery, although passed as early as the years 1540 and 1545, have never yet been acted upon in a single instance in Holland, the most commercial state of Europe.]

Peculators,
or public
defaulters.

of applying it to the use intended, from motives of avarice appropriates it to his own use.⁽¹⁾ The punishment for this offence, besides replacing the money thus corruptly converted, consists mostly in privation of office, imprisonment, banishment, and the like.⁽²⁾ It is an aggravation of this offence when such officer is bound by an oath, and thus adds perjury to his crime.

When members of government or public functionaries accept a present in order to do any act required of them by the duties of their office, or, on the contrary, take a bribe to induce them to violate them, they are liable to punishment,⁽³⁾ which is more or less severe, according to the aggravating or mitigating circumstances of the case.

Loss of office, the being declared infamous, banishment, fine, &c. are the most usual.⁽⁴⁾

SECT. VI.

Prevarica-
tion.

Prevarication is a crime committed more especially by such persons of the legal profession who, instead of faithfully supporting the interests of their clients and defending them, collude with the opposite party, and betray the

(1) *Crimen residui*.—L. 4. S. 4. ff. ad Leg. Jul. pecul.

(2) Quistorp, S. 417. Voet, ad tit. ff. ad Leg. Jul. pecul. n. 6.

(3) T. t. ff. de Leg. Jul. repetund.

(4) Voet, ad d. t. n. 3.

cause.⁽¹⁾ In proportion to the evil intention, and the prejudice to the client, is the punishment lighter or heavier. Suspension, or striking off the roll, or prohibition to practise in future, banishment, and fine, are the usual punishments.⁽²⁾ Prevarication.

SECT. VII.

Among offenders pernicious to society are *cheats at play*, in whose conduct theft and falsity are frequently united, and who may therefore, in aggravated cases, be punished corporally or with banishment. As to games at hazard, besides the disability to maintain an action for the money lost or promised to be paid,⁽³⁾ divers general and local laws have been passed, from time to time, to check the practice, chiefly by imposing fines and arbitrary punishment on those who practise gaming or lend their houses for that purpose.⁽⁴⁾ Cheating at play and gambling.

SECT. VIII.

Against those *who fail* in business, or become *bankrupts*, there is not, strictly speaking, any Bankrupts.

(1) T. t. ff. de prævaricat.

(2) Voet, ad t. n. 3.

(3) De Groot. Inleid. 3 B. 3 D. S. 49.

(4) Plac. van den Hove van Holland van 27 April, 1723; 18 Jann. 1732; 10 Maart, 1749. Handv. van Amsterdam, 1 D. pag. 115. et 2 D. pag. 506. Kuiren van's Hage van 22 Decemb. 1704. Keuren van de Beverwijk, Art. 18.

Bankrupts. law affixing a punishment. The penalty of death, enacted by the Emperor Charles,⁽¹⁾ has, on account of its evident absurdity, never been put in force.

Although it is to be wished that sufficient provision were made, by some wholesome law, against persons who occasion such mischief to society,⁽²⁾ yet no criminal proceedings can be had against them, except when they have rendered themselves liable by falsity, fraud, and such like offences, cognizable at law.⁽³⁾

SECT. IX.

**Usurers
and swind-
lers.**

With regard to *usurers*, that is, those who exact excessive interest, and also such who are guilty of *swindling*; their offence falls under the head of deceit or falsity, and is therefore subjected to a discretionary punishment, according to circumstances.⁽⁴⁾

(1) Edict. 4 Octob. 1540. Art. 2. G.P.B. 1 D. Col. 311.

(2) Such a law we have in fact in Zealand, bearing date the 27 June, 1776. G.P.B. 9 D. pag. 529. In Holland we have as yet proceeded no farther than deliberating upon it. Zurck, Cod. Bat. Art. Bankeroutiers, S. 2. n. 3. However, in the Projet of a new Criminal Code, 4. B. 4. C. an article on criminal bankruptcy has been inserted.

(3) Quistorp, S. 442. Ordonn. voor de desol. boed. kamer. te Amsterdam. Art. 24. 36. 39.

(4) Quistorp, S. 449. Voet, ad tit. ff. de usur. n. 5.

CHAPTER VII.

Of Crimes of Incontinence.

SECT. I.

UNDER this fifth and last head of crimes we must class those which arise from *incontinence*, as *adultery*, *polygamy* or *bigamy*, *rape*, *fornication*, *concubinage*, *sodomy*, and *incest*.

Crimes of
inconti-
nence.

SECT. II.

Adultery is the carnal connection between a married person, whether husband or wife, with any other person than his or her spouse.⁽¹⁾

Adultery.

Adultery is committed either between two persons who are each already married to others, or between a married and a single person. The first is *double*, the other *single* adultery. The crime of adultery consists in the violation of the marriage vow: thus it cannot take place with respect to persons who are only yet betrothed, but not married.⁽²⁾ But certainly with those who are only separated from bed and board (*à mensa et thoro*), as the marriage contract is not thereby dissolved.⁽³⁾ The crime of adultery is completed when those external acts have taken

(1) C. 15. Caus. 32, q. 5.

(2) Boehmer, ad Const. Crim. Carol. Art. 120. S. 3.

(3) See page 88, *supra*.

Adultery. place which nature has required in the union of the sexes, although that which is necessary to impregnation may not have taken place.⁽¹⁾

The punishment of adultery between two married persons is banishment for fifty years, and a fine of a thousand guilders ; and further, that the married man shall be declared infamous, deprived of his office, and incapable to hold any for the future.

And the punishment in cases of adultery by a married man with an unmarried woman, is, as regards the man, the declaring him infamous, depriving him of his office, and also a fine of four hundred guilders, for the first offence ; and for the second offence, a double fine and banishment for fifty years. With respect to the unmarried woman, for the first offence, that she be kept on bread and water for fourteen days ; and for the second offence, banishment for fifty years.

When this crime is committed between an unmarried man and a married woman, the man is to be fed for fourteen days on bread and water, and to pay a fine of four hundred guilders ; and for the second offence, he is banished for life. The woman in this case is banished for fifty years.⁽²⁾

(1) Matthæus, de Crimin. L. 48. tit. 3. Cap. 2. n. 7. 8. et 10.

(2) Pol. Ordonn. van. 1580. Art. 15, 16, et 17. Plac. Holl. 11 Sept. 1677. G.P.B. 3 D. pag. 507.

On account of the difficulty of proof in this case,⁽¹⁾ the public prosecutors are at liberty to compound with the other party as to the punishment.⁽²⁾ Adultery.

SECT. III.

When a person, during marriage premeditatedly enters into marriage with another, and consummation follows thereon, this is termed *bigamy*.⁽³⁾ Bigamy.

The punishment of this offence, in aggravated cases, consists in whipping and banishment; in other cases, the offender is exposed publicly on the scaffold, and then banished.⁽⁴⁾

SECT. IV.

Under the crime of *rape*, we comprehend not Rape.

(1) Advis van De Groot, in de Holl. Cons. 3 D. 2 vol. pag. 707.

(2) Resol. Holland. 29 July, 1679. G.P.B. 7 D. pag. 960. Van Alphen, papeg. 2 D. pag. 523. This of itself is a wise and politic regulation, provided it were confined within just, moderate, and equitable limits; but alas! to how many public prosecutors may we not apply, with feelings of sorrow, the passage of the poet?

“ Quid non mortalia pectora cogis? auri sacra fames.”

It ought not, therefore, to excite surprise that in the *Projet* of the New Criminal Law, no mention is made of *mulcts* or *compositions*. Though, perhaps, this again is carried a little too far the other way.

(3) Boehmer, ad Const. Crim. Carol. Art. 121.

(4) Regtsgel, Observ. 1 D. Obs. 10. V. D. Keessel, Thes. 62.

Rape.

only the *violently ravishing* a woman or maid, but also the carrying her off by force, and against her will.

The magnitude of the crime depends much on the circumstances of the case in aggravation or mitigation. Among those of an aggravated nature are cases in which the *rape* is committed under terror of fire-arms, or other weapons, with which the offender is armed, or if the offence is committed on the public highway, or on a married woman, or on a girl under the age of puberty, or on one deprived of her intellects, or by guardians, teachers, or directors, whose duty it was, on the contrary, to have protected the chastity of the person ravished.⁽¹⁾

The punishment of this crime varies according to the circumstances: in aggravated cases, the punishment of death is applied; in others, a discretionary punishment proportioned to the case.⁽²⁾

SECT. V.

Fornication.

Under the head of *fornication*, as a criminal offence, we understand the conduct of those who, from a love of gain, or excess of lust, lend their body to the carnal knowledge of all persons. Whoever seduces women thereto, or lends his house for this purpose, and obtains a

(1) Boehmer, ad Const. Crim. Carol. Art. 118 et 119. et in Observ. ad Carpzovii Prax. Crim. Part. 2. quæst. 75.

(2) Voet, ad tit. ff. ad Leg. Jul. de adult. n. 2.

living by this means, is termed a *bawd*, *pander*, or *pimp*. Fornication.

In many parts of this country, this crime is winked at, although many laws exist against it. We may in general say that fornication is an offence left chiefly to the correction of the police, who in scandalous cases proceed therein without form of process, and in a summary manner; and are accustomed, from time to time, when the offence becomes too public, to demolish the brothels, and to punish the keepers of them, and the prostitutes found therein, with imprisonment and banishment for a limited time.⁽¹⁾

SECT. VI.

When two unmarried persons, by a mutual agreement, entered into either for life or for a limited time, live and cohabit together, though without being married, as man and wife, it is termed concubinage.⁽²⁾ Concubinage.

Though according to the law of nature, there is nothing improper in this,⁽³⁾ and concubinage among the Romans was permitted;⁽⁴⁾ yet, ac-

(1) Voet, ad d. t. n. 1. Zurck, in Cod. Bat. Art. Hoererije. S. Van Leeuwen, R.H.R. 4 B. 37 D. n. 11.

(2) Leyser, Medit. ad ff. Tom. 9. Spec. 585.

(3) See the authors quoted by Meister, in Biblioth. Jur. Nat. et Gent. Tom. 1. pag. 82.

(4) Heineccius, ad Leg. Jul. et Pap. Lib. 2. Cap. 4.

Concu-
binage.

According to our law, it is, for good reasons of state policy, prohibited, and for the first month that the parties thus cohabit together, a fine of fifty guilders is imposed on each ; for the second month, an additional fine of one hundred guilders ; and if they still continue to cohabit together, banishment for the term of ten years, and a discretionary fine.⁽¹⁾

This law is properly interpreted so as to be only applicable to those who, after previous warning and admonition to discontinue this course of life, still persist therein.⁽²⁾

SECT. VII.

Sodomy.

The unnatural crime committed by men with men, or men with beasts, constitutes the horrible crime of *Sodomy*.⁽³⁾ A crime so contrary to all the laws of nature, to the laws of God, and the welfare of society, that by an express law it is declared,⁽⁴⁾ that this crime shall be publicly punished with death ;⁽⁵⁾ and that the bodies of

(1) Pol. Ordonn. van 1580. Art. 3.

(2) Groenewegen, de Legib. abrog. ad L. 2. C. de natur. lib. n. 7. Brouwer, de Jure Connub. Lib. 1. Cap. 27. n. 30. Voet, ad tit. ff. de concub. n. 3.

(3) A. Van Goudoever, Dissert. de nefanda libidine, (Traj. 1731.)

(4) Plac. Holl. 21 Julii 1730. G.P.B. 6 D. pag. 604.

(5) Schoon, 'er niemand, die wel denkt, zal gevonden worden,

the offenders be immediately burnt to ashes, or Sodomy.
thrown into the sea, or exposed on a gibbet.

SECT. VIII.

Lastly, among the crimes arising from incon- Incest.
tinence, must be reckoned *incest*, whereby we understand the intermarrying or carnal connection of persons, whose marriages with each other are forbidden by law, on account of consanguinity. The punishment of this offence varies according to the degree of relationship between the parties; incest between parents and children, is generally punished with death. With respect to persons who are collaterally related, it is punished corporally, or with banishment, &c.⁽¹⁾

of hij neemt gaarne over het gezegde van Montesquieu, *Espr. des Lois*, Liv. 12. Chap. 6. “ *A Dieu ne plaise, que je veuille diminuer l’horreur, que l’on a pour un crime que la Religion, la Morale, et la Politique condamnent tour-à-tour ;*” zoo is egter wel eens, en niet zonder grond getwijfeld, of de doodstraf wel de juiste en recht gepaste straffe in deeze misdaad zij. *Bedenkingen over het straffen van zekere schandelijke misdaad. (Amst. 1777.)*

(1) S. V. Leeuwen, Cens. For. Part 1. Lib. 5. Cap. 28. n. 6. ibique De Haas, in not. Lybarechts, Reden Vert. over't Not. Ambt. 1 D. 11 Hoofdst. n. 10.

CHAPTER VIII.

Of the Evidence in Criminal Cases.

SECT. I.

Evidence
in criminal
cases.

WHAT we have already observed,⁽¹⁾ with respect to the different sorts of proof, in transactions in civil cases, is also for the greater part applicable to criminal cases. However, in those cases to which corporal punishment is incident, there are some points which deserve to be noticed.

As, according to the general rule, in a criminal proceeding which involves corporal punishment, perfect proof is necessary; so, to constitute this proof, two things are required :

1. That a crime has actually been committed; and
2. Who has committed it.

SECT. II.

*Corpus
delicti.*

To found a criminal investigation we must first ascertain beyond doubt, that a crime has actually been committed, or, has it been expressed in other words, proof of the *corpus delicti* must be clear.⁽²⁾ This may be established by tracing

(1) 1 B. 17 Afd. bladz. 175. en volgg.

(2) L. 1. S. 24. ad Sect. Silan. L. 16. C. de poen. Boehmer, ad const. Crim. Carol. Art. 6. S. 10. seqq.

and examining the marks or remains, which the crime committed has left; for instance, in homicide the body of the party slain constitutes the *corpus delicti*; in forgery, the forged paper or instrument; it is therefore the first duty of judges, to make a careful and accurate investigation, with the assistance of skilful persons, when necessary, as to the marks, signs, or indications of a *corpus delicti*.

This takes place especially in the case of examining dead bodies; in house-breaking, as to the marks and signs of breaking and entering, and the like. But if the crime be of that nature that it leaves no traces or *vestigia*, as in many offences which arise from incontinence, the fact of the crime having actually been committed must be established by the testimony of witnesses, or other clear proof.⁽¹⁾

SECT. III.

After the *corpus delicti*, or commission of the crime, has been established, then follows the question, who has committed it? This is ascertained in various ways, either by *confession* of the party, or by *witnesses*, *written proof*, or clear *evidence*, from circumstances.

The *confession* of the party himself, is one of

(1) Leyser, Medit. ad ff. Tom. 8. Spec. 561. et Tom. 9. Spec. 598.

Confession.

the highest proofs in criminal cases,⁽¹⁾ provided the truth thereof be confirmed by the evidence of witnesses, and by all the circumstances of the case. To constitute a perfect and valid confession in law, it is required,

1. That the commission of the crime sufficiently appear.

2. That the confession has been taken before the lawful judge. Extra-judicial confession, though it may raise a presumption, yet does not constitute full proof.⁽²⁾

3. That it be simple, clear, in plain terms, and voluntary.⁽³⁾ Consequently it must not be elicited by entrapping questions, or words put into the mouth of the party.

4. That the information, obtained *aliunde* by the judge, agree with the confession.

5. That the special circumstances stated by the party in his confession, be found on subsequent investigation to be correct.⁽⁴⁾

6. That the confession contain such circumstances as the party, in case he were innocent, could by no possibility have known.⁽⁵⁾

(1) L. 1. ff. de confess.

(2) Boehmer, ad Const. Crim. Carol. Art. 32.

(3) Boehmer, d. l. Art. 60.

(4) Boehmer, d. l. Art. 54.

(5) J. G. Heineccii, Exercit. de religione judicantium circa reorum confessiones, in opusc. var Syll. pag. 650-695.

SECT. IV.

When the party accused denies the charge Witnesses. against him, either wholly or with respect to the chief circumstances, or rests his defence on matters which must be proved *aliunde*, the most usual kind of proof is that by witnesses.

With respect to this kind of evidence, so far as it relates to criminal cases, the following things deserve to be noticed :

1. The question, whether a witness is admissible or not, is best determined by the judge himself on a sound view of the case.⁽¹⁾

A defect in the testimony of a witness, or an objection to his evidence, is more easily overlooked by the judge, when he is produced in defence of the prisoner, or in mitigation of punishment, than when he is produced on the side of the prosecution.

2. The evidence of such witnesses as can give no reason for their knowledge of what they have deposed, or who are deficient in their intellects, is rejected.

When the evidence of a witness is vague or uncertain, or when his veracity is questioned, this must afterwards be weighed, and its effects decided on by the judge, from comparing it

(1) L. 3. S. 2. L. 13. ff. de testib.—Leyser, *Medit. ad Pand.* Tom. 4. Spec. 283.

Witnesses. with the concurrent circumstances.⁽¹⁾ No witnesses can constitute a perfect proof in criminal cases who have not attained the age of twenty years.⁽²⁾

Witnesses under that age may be heard, and their evidence may serve to furnish information touching the matter, or to explain or confirm other evidence.⁽³⁾

4. Although a witness to deny the fact, does not constitute full proof, yet this may be the case when the concurrent circumstances tend to show that if the fact had really taken place the witness must have had some knowledge of it or reason to suspect it, and is not supposed to have any interest in concealing it.⁽⁴⁾

5. In criminal cases, particularly those of importance, no witnesses are admissible but those summoned by the judge himself; who, for this purpose, generally hears them upon interrogatories, each of which must relate to a separate or special point in the case, and if necessary, must be explained to the witness when he does not appear to comprehend the meaning; the answers of the witness must, as nearly as possible, be expressed in his own words.

(1) Boehmer, ad Const. Crim. Carol. Art. 66.

(2) L. 20. ff. de testib.

(3) Carpzovii Prax. Crim. Part 3. quæst. 114. n. 41. seqq.

(4) Leyser, Medit. ad Pand. Tom. 4. Spec. 286.

6. No witness is good evidence until he is sworn.⁽¹⁾ The certificates of witnesses who have not been sworn, and the swearing of whom has sometimes, for prudential reasons, been deferred or omitted, raise a presumption only, but do not constitute proof. Witnesses.

SECT. V.

Written evidence or instruments in writing, although of daily use in civil cases, are seldom used in criminal cases; for no public or notarial acts or instruments occur in crimes and misdemeanors, as in other matters and transactions of commerce and civil society; and if there should be any public act of this nature, it is chiefly used for the purpose of proving the *corpus delicti*; however, sometimes extracts from the *protocol*, or minutes, and records of the criminal court, respecting the examinations and sentences of accomplices, also letters of the party accused, or his correspondence with others, may be received as evidence. Written evidence.

Provided, however, that so far as the writings are of a private nature, the hand-writing or signature of the party is acknowledged or proved.⁽²⁾

(1) Boehmer, ad Const. Crim. Carol. Art. 70. S. 4.

(2) Quistorp, 10 Abschn. 12 Hauptst. S. 707-709.

SECT. VI.

indicia.

The validity of proof by *appearances*, when clear, *indications*, *signs*, &c.* has frequently been a question among lawyers; some being for its admission, others again wholly rejecting it.⁽¹⁾ But these contrary opinions appear to be very easily reconcilable, if we only make the proper distinction between *suspitions*, *presumptions*, and *indications*, (*suspicien*, *presumptien*, *et indicien*,) and confine the latter to such facts as are sufficiently proved of themselves, and which cannot be true without the guilt of the party accused flowing therefrom as a necessary consequence, and therefore such proofs ought, according to our opinion, to be held sufficient to justify the ordinary punishment prescribed by law for the offence against the party accused.⁽²⁾

(1) Leyser, *Medit. ad Pand.* Tom. 4. Spec. 257. Boehmer, *ad Const. Crim. Carol.* Art. 22. S. 4. et Art. 23 et 24. *Deductie in Revisie*, in de *Zaak van J. B. F. van Goch.* Art. 143-461. en van den *Hoofd. Officier van Amsterdam*, Art. 203-863.

(2) See the above *Deductien*, and the respective sentences of death in that case confirmed in revision.

* In the Criminalists, we find all that with us constitutes presumptive or circumstantial proof, subdivided into *indicia*, *signa*, *adminicula*, *presumptiones*, *conjecturae*, *dubia*, *et suspiciones*.—T.

CHAPTER IX.

In what manner Crimes are cancelled or extinguished.

SECT. I.

CRIMES are cancelled, and the proceedings on them closed, by the following modes:—*punishment, grace or pardon, composition, prescription, death.* How crimes are cancelled.

SECT. II.

So soon as the offender has suffered the punishment affixed by the law, after due examination and sentence, he is freed from all further prosecution on account of that crime.⁽¹⁾ Since it would be contrary to justice that any one should be punished twice for the same offence.⁽²⁾ Punishments.

But although the crime is expiated by the punishment, yet the party is not thereby so perfectly cleared as to prevent his being subjected to a heavier punishment in case he is afterwards convicted of a similar offence.⁽³⁾ Nay, even with regard to thieves, vagabonds, and

(1) L. 7. S. ff. de jur. patron.

(2) L. 23. C. de pœnis.

(3) L. 28. S. 3. et 10. ff. L. 22. C. de pœnis. Pol. Ord. Art. 3 et 16. Plac. Hol. 19 Maart, 1614. Art. 1 et 4, and a number of other laws.

Punish-
ments.

disturbers of the public peace, who have been once already corporally punished, they are debarred the privilege of appeal on a second conviction for the same offence.⁽¹⁾

SECT. III.

Grace.

Crimes are also extinguished by an *act of grace* granted by the sovereign. Sometimes, from motives of state policy, an act of grace is granted in favour of a number of persons who have been guilty of offences arising chiefly from the unfortunate source of civil dissensions, party differences, and factions; the number of the offenders being too great to admit of their being punished without prejudice to the state. This act of grace is termed an *amnesty*.⁽²⁾

Sometimes it is granted to particular persons, not as an act of gratuitous mercy, but for strong reasons of equity, which, under the special circumstances, could not suffer the punishment of the law in such case to be enforced without manifest hardship.⁽³⁾

The different sorts of grace, accorded to par-

(1) Plac. Holl. 17 Junii, 1718. G. P. B. 5 D. pag. 764.

(2) Of which a number of examples are to be found in the G. P. B. 2 D. Col. 2397. 3 D. pag. 189, 517, et 518. 7 D. pag. 840. 9 D. p. 420, 430, 433, 441, 444, 446, 448, 576, 578, et 816.

(3) Carpzovii Prax. Crim. Part 3. quæst. 150. ibique Boehmer, in Observ. See further, an opinion of the Court of 8 Decemb. 1784. to be found in my Pract. 2 D. pag. 257. et volgg.

particular persons in criminal cases are the following : Grace.

1. *Pardon*, which is granted 'in all kinds of crimes (except murder), but always with reservation of the right of the party injured to compensation in damages.

2. *Remission*, which is granted in cases of homicide or manslaughter, generally with a fine to the sovereign, by way of compensation.

3. *Abolition*, which has place in all sorts of crimes, and operates as a complete acquittal of the act, on the ground of the concurrence of very favourable circumstances, either with relation to the party or the act itself; and

4. The *license* to remain unmolested, which is granted to a party who has slain another in his own defence.⁽¹⁾

SECT. IV.

Although the granting of grace or pardon is the office of the sovereign, and the judge (however in apportioning the judgment he may notice the circumstances in aggravation or mitigation) is nevertheless bound to keep the law,⁽²⁾ and not prefer mercy to strict justice :⁽³⁾ yet in the administration of criminal justice two means

Composition and submission.

(1) Judic Pract. d. l. pag. 272-274.

(2) L. 1. S. 4. ad Sct. Turpil. Crim. Ordonn. van 1570. Art. 56.

(3) Resol. Holl. 27 Septemb. 1668. G. P. B. 3. D. pag. 85.

Compo-
sition and
submis-
sion.

have been introduced of mitigating the severity of the law, which are of frequent use.

First, the declaring that the cause is *civil* and *compoundable*. This judicial declaration is necessary in all cases in which a further punishment is affixed by the law than a mere fine,⁽¹⁾ or in which *composition* is not expressly allowed to the public prosecutor, as in the crime of adultery.⁽²⁾

However, the judge's power even in this respect, is limited and confined within certain bounds, and composition is never permitted in cases of serious crimes wilfully committed; as, for instance, homicide with malice aforethought, or otherwise aggravated, perjured evidence, coining, rape, and the like.⁽³⁾

The judge, therefore, previously to declaring any criminal case subject to corporal punishment, civil and compoundable, must take into consideration whether it appear from the circumstances of the case, that the party has committed the offence more through inadvertence than a bad design; for if the latter be the case, and the public good requires that justice be executed on the offender, then it would be of pernicious consequence and beyond the

(1) Ordonn. van Keizer Karel van 19 Meij 1544. Art. 3 et 4. Nader Ampl. Instr. van't Hof. van 1664. Art. 30.

(2) Resol. Holl. 29 Julii 1679. G. P. B. 7 D. pag. 960.

(3) Instr. Hof. Art. 9.

judge's power and duty to permit a crime to be compounded for a sum of money, to which crime the law, for the sake of public security, has assigned a corporal punishment.⁽¹⁾

Compo-
sition and
submis-
sion.

2. The power of being received by the judge in *submission*, which is exercised when the judge is not clear whether or not the case can be declared civil and compoundable. It is also on such occasions left to the discretion of the judge to determine whether this measure is applicable to the case before him or not.

He ought not, however, to admit it in those wilful offences to which public corporal punishment is affixed, on account of the public good and to deter others; but only in such cases as labour under some obscurity, or which, from the circumstances, are more or less excusable.⁽²⁾

SECT. V.

In the same manner as suits in personal or real actions are barred or prescribed by the lapse of a certain time, so also are proceedings barred in criminal cases, when a certain time has elapsed after the commission of the crime, without any proceedings having been instituted

Prescrip-
tion.

(1) Regtsgel. Observ. over De Groot's Inleid. 4 D. Obs. 40.

(2) See my Judic. Pract. 2 D. 4 B. 5 Hoofdst. S. 18-20.

Prescription.

against the party. This principle is applicable to all sorts of crimes without distinction,⁽¹⁾ and to form a bar, the term of twenty years is required.⁽²⁾ The crime of adultery has, however, this peculiarity, that the proceedings in such case are prescribed after the expiration of five years.⁽³⁾

SECT. VI.

Death.

Finally, crimes are extinguished and determined by the *death* of the offender: the consequence of which is, that no one after his death can be indicted for a crime committed by him except in cases of high treason and peculation.⁽⁴⁾ So that even if the party be already on his trial, or if he die during the proceedings before sentence, the proceedings thereby drop, and cannot be revived against his heirs contrary to their will;⁽⁵⁾ not even to recover the costs on the part of the prosecutor, incurred up to the death of the party, since to determine the question of

(1) Leyser, *Medit. ad Pand.* Tom. 7. Spec. 515. Boehmer, in *Observ. ad Carpzovii. Prax. Crimin.* Part. 3. quæst. 141. *Observ.* 1.

(2) L. 12. C. ad leg. com. de fals. L. 3. ff. de requir. reus. L. 13. pr. ff. de div. tempore. præscr. Matthæi Paroem. 9. n. 14.

(3) L. 29. S. 5. 6. et 7. ff. L. 5. L. 28. C. ad Leg. Jul. de adult. Voet ad d. t. ff. n. 22.

(4) Matthæus, de Crimin, Lib. 48. Tit. 19. Cap. 3. n. 4. 6.

(5) L. 15. S. 4. ff. ad Sct. Turpil.

the liability of the heirs to pay these costs, the **Death.** guilt or innocence of the party accused must be established, which, if the heirs are unwilling, they cannot be constrained to submit to, by continuing the proceedings.⁽¹⁾

(1) See my Memorials, concerning two interesting criminal questions. (Utr. 1791.) en B. Vorda, Aanteek op de Crim. Ordonn. Art. 67.

INSTITUTES
OF THE
LAWS OF HOLLAND.

BOOK III.

**ON THE MANNER OF PROCEEDING AS WELL IN
CIVIL AS IN CRIMINAL CASES.**

General Contents and Divisions of this Book.

It is not sufficient to know what the rights are, which men in relation to each other have *in* or *to* certain things; what is requisite to constitute a crime, and with what punishment each particular species of offence ought to be visited; but after having acquired, according to its fundamental principles and axioms, a knowledge of this part of the science of law, we must proceed to inquire, what is the proper form and mode of proceeding to vindicate and support our lawful

**Contents
of this
book.**

Contents
of this
book.

rights in civil cases, and in what way the inquiry must be conducted to do right and justice in criminal cases, in order, if the party be found guilty, to punish him, and if innocent, to acquit him.

Every one must feel that a proper order, and regular mode of proceeding in both these cases, is important to the welfare of society, and we therefore shall dedicate a special book to this practical part of Civil and Criminal Jurisprudence.

The difference between the form and manner of proceeding in civil and criminal cases is very great, and in order not to confound one with the other; we shall divide this book into two distinct parts, whereof the one will treat of the *manner of proceeding in Civil Cases*, and the other, in *Criminal Cases*.

PART I.

MANNER OF PROCEEDING IN CIVIL CASES.

CHAPTER I.

SECT. I.

THE general rule as to the institution of all suits and actions at law, is that the plaintiff must bring his action before the ordinary or competent judge of the defendant,⁽¹⁾ and consequently no one can, in the first instance, be sued out of the jurisdiction of his ordinary and competent judge, i. e. the judge of his actual domicile.⁽²⁾

Those judges who hold jurisdiction in the towns and villages are termed *Schepenen*,⁽³⁾ over whom the *Schout*, or bailiff of the district, usually presides as chairman. His office consists chiefly

(1) L. 2. C. de jurisd. omn. jud.

(2) Instr. Hof, Art. 220.

(3) Notable Deductie in de Holl. Cons. 3 D. 2 Vol. Cons. 226. n. 19.

in regulating the administration of justice within his district. It is his duty to assemble the bench of *Schepenen* or magistrates, hold the courts, and the like.⁽¹⁾

As the bench of *Schepenen* was found insufficient, particularly in the great towns, to dispatch the ordinary business, and as on account of the multitude of small causes, causes of importance were delayed, inferior courts were established in different places,⁽²⁾ as at *Haarlem*, an inferior court of justice; at *Enhuizen*, a court of *small causes*; at *Rotterdam*, a court of *Arbitrators* or *Peace-makers*, with jurisdiction up to 300 guilders; at *Leyden*, a court of *Peace-makers*, before whom all causes, without distinction, must be brought, in order to see whether an amicable arrangement can be effected between the parties, previously to proceeding at law; at *Dordrecht*, a board for matters relating to the water rights or internal navigation; at *Amsterdam*, there are several establishments of this nature, to relieve the ordinary tribunals, such as the commissaries of marriage causes, commissaries of the chamber of desolate estates, commissaries of insurance and sea causes.

(1) See my *Verhand. over de Jud. Pract.* 1 B. 4. Hoofdst. S. 3 et 6.

(2) *Jud. Pract.* 1 B. 4 Hoofdst. S. 5.

SECT. II.

The authority of the *Schepenen*, or town magistrates, is confined to causes between private individuals. They have no jurisdiction in matters of municipal polity. These, as well as the management of the town revenues, and its welfare and security, in general were committed to the corporation or burgomasters,⁽¹⁾ in whose place have now been appointed other *departmental* authorities.

In the country or rural districts, these matters of local polity, and in general, those pertaining to lands, &c. are confided to the magistrates of the district, and every thing specially relating to dikes and waters, to particular officers termed *Dike inspectors*.⁽²⁾

SECT. III.

The upper courts of justice in Holland at present are the *Court of Justice*,* and the *National Tribunal*. These courts have jurisdiction either in the first instance, or in appeal. National tribunal.

The jurisdiction of the *National Tribunal* is limited to the following matters :⁽³⁾

(1) Kort Vert. van't Regt. der Ridderschap, Edelen, en Steden van Holland, van 16 October, 1587. G. P. B. 1 D. fol. 44.

(2) Jud. Pract. 1 B. 4. Hoofdst. S. 7.

(3) Instruct. van't Nation. Geregthof. Art. 42-53. Straats-reg van 1805. Art. 78-86.

* See page 151, *supra*.

National
tribunal.

1. The granting exclusively *Surcheances*, or suspensions of payment, writs of *Sureté de Corps*, and further to the granting of all such licences or dispensations on the part of the sovereign as is committed to it.

2. The granting of equitable relief in all matters pending before them.

3. The general superintendence over all courts, judges, and tribunals, with power to cassate, or stay the execution of their sentences, and in the latter case to remove the cause to another court.

4. To decide all questions as to jurisdiction between public officers and courts of different jurisdictions ; also between such courts and inferior ones of the same department.

5. To take cognizance in the first instance of all matters, whether relating to the right of possession, or the right of property (i. e. in the *Possessoire* or *Petitoire*,) wherein the government or any government boards, servants of government, as receivers, collectors and the like, are defendants. So also of all matters wherein the government receivers, collectors, and the like, as its agents, are plaintiffs, and private persons are defendants, provided the latter have expressly submitted themselves to the jurisdiction.

6. It takes cognizance also of all crimes and misdemeanors committed by any members of

the assembly of their High Mightinesses, and also by the higher public functionaries, whether relating to matters connected with their office, or otherwise.

National
tribunal.

7. To this court also lies an appeal in all causes which in the first instance have been heard before the departemental or provincial tribunals.

SECT. IV.

The Court of Justice of Holland takes cognizance in the first instance :

Court of
Holland
judges in
the first
instance.

1. Of all matters between such parties as have no other ordinary judge, and who are under the same departemental tribunal ; for example, disputes arising from the non-compliance with letters requisitorial, questions as to jurisdiction arising between different towns, and villages, and the like.⁽¹⁾

2. Complaints against the bailiffs of districts, and other public prosecutors, on the ground of extortion and concussion in the exercise of their office.⁽²⁾

3. Cases in which the presence of members or officers of this court is necessary.⁽³⁾

(1) Jud. Pract. 1 B. 5 Hoofdst. S. 5. Reglem. voor de depart. Bestuuren van 19 Julii 1805. Art. 57.

(2) Jud. Pract. ibid. S. 7.

(3) Provis. Ordre. van 27 Sept. 1614. Art. 9.

Court of
Holland
judges in
the first
instance.

4. In the case of vagrants, and such persons as have no fixed domicile.⁽¹⁾

5. Cases wherein the rector or professors of the university of Leyden, or their widows, are defendants.⁽²⁾

6. Cases of minors, widows, orphans, or other helpless persons, (*miserable personen*),* when they prefer bringing their action in the first instance before the court.⁽³⁾

This privilege, however, does not extend to small causes,⁽⁴⁾ or to cases in which such privileged persons have obtained their title or right of action from another by cession or assignment.⁽⁵⁾

7. Cases of libel against officers of government and other privileged persons.⁽⁶⁾

8. Cases regarding the salary and charges of counsel and attorneys in causes before the court.⁽⁷⁾

(1) Jud. Pract. *ibid.* S. 10.

(2) Nad Ampl. op het 39 Art. van de Statuten de Universiteit van Leyden, van 24 Maart, 1662.

(3) Instr. Hof. Art. 8.

(4) Ordonn. op de kleine Zaaken, van 21 Dec. 1579. Art. 2. Nad. Ampl. Instr. Art. 2-7.

(5) Ampl. Inst. Art. 1.

(6) Instr. Hof. Art. 8.

(7) Instr. Hof. Art. 73. See my *Verzam. van Gewijsden* 1 D. Cas. 26.

* Such persons are termed in the Roman law *miserabiles personæ*, and considered as entitled to peculiar protection.—T.

9. Cases of crimes in which the term of prescription has run, but which have remained unpunished.⁽¹⁾

Court of
Holland
judges in
the first
instance.

10. All causes wherein the parties have expressly submitted themselves to the jurisdiction of the court.⁽²⁾

11. If any one gives out, or pretends to have an action against another, in such case the court will grant a writ (termed *mandamenten om actie te institueeren*,) at the instance of the party thus calumniated, to compel the other to bring his action within a limited time, or be enjoined perpetual silence.^{(3)*}

12. Similar to this is the *mandament of Purgation*, when a report is circulated to the prejudice of any one that he has committed some crime of which he is conscious that he is innocent.⁽⁴⁾

13. So also the mandaments to see execution decreed of a superannuated sentence, whether of this court or of any other in the department of Holland,^{(5)†} and *to see condemnation decreed on*

(1) Instr. Hof. Art. 8. Judic. Pract. 1 B. 5. Hoofdst. S. 15.

(2) Nad. Ampl. Instr. Art. 5 et 6.

(3) Jud. Pract. *ibid.* S. 17.

(4) Instr. Hof. Art. 8 et 225.

(5) Instr. Hof. Art. 118.

* See note, page 426, *infra*.

† For further explanation of this and the following writs, see p. 423, *et seqq-infra*.

Court of
Holland
judges in
the first
instance.

an act of *willing condemnation*, or warrant of attorney to confess judgment, when by the death of the party granting it, or other like circumstances, it cannot be put in force without hearing the opposite party.

14. When any one has several co-debtors or co-obligors for the same debt or demand, living under different jurisdictions, he may cite them all in the first instance before the court to prevent contradictory judgments.⁽¹⁾

15. The court also takes cognizance, in the first instance, of all matters relating to disturbance of possessions; and grants, for this purpose, the writs of *spolie*, *maintenue*, and *complainte*.⁽²⁾

16. This court sometimes obtains cognizance of a cause by a mandament of arrest, by which a party domiciled out of its jurisdiction is rendered subject to it by arrest of his person or goods.⁽³⁾

17. It also grants *mandaments penal*, or *injunctions*, whereby any one is enjoined from proceeding in any act or work in opposition to the manifest right of another, and to stay which the ordinary means of law are insufficient.⁽⁴⁾

18. In case also of the refusal of justice in an

(1) Resol. Holl. 10 Julii. 1677. in de papeg. 2 D. pag. 221.

(2) Instr. Hof. Art. 8 et 39.

(3) Merula, Man. van Proced. Lib. 4. Tit. 2. Cap. 25.

(4) Instr. Hof. Art. 12.

inferior tribunal, the court grants the *mandament of evocation or certiorari*.⁽¹⁾

Court of Holland judges in the first instance.

19. It also grants the *mandamenten van sauvegarde*, or *protection*, when any person is threatened by another with violence.⁽²⁾

20. From the court also issue *attachments* (*letteren van attache*), to render executory throughout Holland the sentences and orders of the judges of the other departments.⁽³⁾

21. Lastly, this court grants the writ of benefit of inventory—acts of diligence in a cause, and also writs of sovereign or equitable relief, with *committimus* to the courts below for confirmation, such as the writs of the *cessio bonorum*, *attribution* or *respijt*,⁽⁴⁾ also *mandaments of induction*.⁽⁵⁾

SECT. V.

In all the above enumerated cases, the court of Holland has jurisdiction in the first instance. But it is more especially to be considered *as a court of appeal*. The general rule is, that every

Court of Holland a court of appeal.

(1) Jud. Pract. 1 B. 5. Hoofdst. S. 27.

(2) Van Alphen, papeg, 1 D. pag. 511. et 2 D. pag. 496.

(3) Inst. Hof. Art. 221.

(4) These writs of sovereign relief were formerly issued by the supreme court; but on the abolishing of the court, the power has been transferred to the Court of Holland. Regul. 18th Sept. 1795. Art. 2.

(5) Resol. Holl. 24 Nov. 1581. G. P. B. 2. D. pag. 1422.

Court of
Holland
a court of
appeal.

one is at liberty to appeal from a sentence, decree, order, or other appointment, by which he thinks himself aggrieved.⁽¹⁾

However, this rule is subject to some exceptions which deserve to be briefly noticed in this place :

1. The court cannot admit an appeal from any *interlocutory order* or *provisional sentence* of the town tribunals, or of *the bailiffs or good men* (*bailhoven en mannen*) of their districts, (i. e. *probi homines ac legales*,) or by the village courts,* or delay the provisional payment, (*namptissement*,) thereby decreed on any pretence whatsoever, not even under the allegation of nullity or injustice, unless the damage to be occasioned by the execution of the provisional decree or interlocutory order be of such a nature that it would be irreparable at the *definitive* or by the final judgment on the merits.⁽²⁾

(1) Instr. Hof. Art. 198. et 205.

(2) Ampl. Instr. van't Hof. van 21 Decemb. 1579. Art. 3. Resol. Holl. 19 Maart, 1622. in de papeg. 1 D. pag. 304. Jud Pract. 2 B. 24 Hoofdst. S. 2.

* These town and local tribunals not being composed of professional persons, were in the habit of submitting cases to counsel, on points of law or of peculiar difficulty.

Indeed, by the 38th Article of the Criminal Edict of Ph. II. of Spain, they were commanded to do so : “ In cases of difficulty and importance, we direct the subaltern judges to consult persons learned and skilful in the laws, and not suspected.”—See Criminal Report, p. 32. 71. 72.

2. No appeal lies to the court in matters not exceeding one hundred guilders, decided by the tribunals of walled towns, the Hague included. Nor in those not above forty guilders, decided by the bailiffs and good men, or town and village tribunals.⁽¹⁾

Court of
Holland
a court of
appeal.

3. From sentences in criminal cases, conducted in extraordinary process, and founded on the confessions of the prisoner,⁽²⁾ no appeal lies to the court except in the case of manifest nullity in the proceedings, or of gross disproportion in the punishment adjudged.⁽³⁾

4. In marriage cases, if the decision of the judge be conformable to the prayer of the parents, or the survivor of them, no appeal lies.^{(4)*}

5. Nor on any account is an appeal permitted from sentences given against a party by default, or who is in contempt for non-performance, provided the terms have properly run, and the defaults are regular.⁽⁵⁾

6. No appeal lies to the court from the orders

(1) Plac. Holl. 8. Meij, 1674. G. P. B. 3. D. fol. 704.

(2) Resol. Holl. 10 Sept. 1591. G. P. B. 2. D. fol. 1062.

(3) Jud. Pract. 2 B. 24 Hoofdst. S. 4.

(4) Resol. Holl. 5 Dec. 1579. Edict Holl. 27 Sept. 1663. G. P. B. 3 D. pag. 505. Bynkershoek, Quæst. Jur. Priv. Lib. 2. Cap. 5.

(5) Jud. Pract. *ibid.* S. 7.

* See page 81, *supra*.

Court of
Holland
a court of
appeal.

or regulations of the district governments or corporations, in matters of municipal polity, since the court is not entitled to take cognizance of any questions of polity, or of this nature.⁽¹⁾

However, we must not, under this head of exclusion, comprehend orders of *confinement* and *curatorship* made by the magistrates, as is the practice in several places.⁽²⁾

Some sentences may, notwithstanding appeal to the court, be put into execution under security. Of this kind are sentences of the tribunals of *Dordrecht, Haarlem, Delft, Leyden, Amsterdam, Gouda, and Rotterdam*, for sums not exceeding six hundred guilders, and for other walled towns and the Hague, up to three hundred guilders. Sentences of the bailiff and men to one hundred and twenty guilders, and of the lower tribunals and villages to eighty guilders.⁽³⁾

Sentences also imposing fines which do not render the party infamous, or otherwise irreparably prejudice his reputation, are, in like manner, executable under security, notwithstanding appeal.⁽⁴⁾

Although, finally, an appeal lies from decrees

(1) Resol. Holl. 12 Julii, 1674. G. P. B. 3 D. pag. 682.

(2) Jud. Pract. *ibid.* S. 8.

(3) Plac. Holl. 8 Meij, 1674. G. P. B. 3 D. fol. 704.

(4) Instr. Hof. Art. 214. Judic. Pract. 2 B. 24. Hoofdst. S. 13.

made by the court of Holland in causes of the first instance to the national tribunal, we must, however, except therefrom those sentences from which no appeal lay to the supreme court before its abolition, such as in causes for sums below four hundred guilders, provisional and interlocutory sentences, simple citations to appear by attorney, on citations to appear in person,* sentences in possessory cases,† regulations of the court as to its own manner of proceeding, and matters of discipline, and willing condemnation.⁽¹⁾

Court of Holland
a court of appeal.

SECT. VI.

Besides the courts of justice of Holland, there are also upper courts in different districts, which although principally constituted to take cognizance of criminal cases, nevertheless have jurisdiction in appeal, from the inferior tribunals.

Bailiff and men.

Of this kind are the bailiff, and well-born men, (*Welgeboren Mannen*) of *Rhynland*.⁽²⁾ The

(1) Judic. Pract. 2 B. 24 Hoofdst. S. 15—20.

(2) S. Van Leeuwen, Cost. van Rhijnland, pag. 60.

* In Criminal Cases, see *infra*.

† The absolute title or right of property in the thing is decided by a final judgment, on what is termed the *Petitotie*, therefore the decree in possessory cases, or the *Possessoire*, is of a provisional nature, and as such not appealable. See *infra*.

Bailiff and men. bailiff and *Feudal or manorial tenants (Kennemerland)*.⁽¹⁾

The court or high tribunal of *Detfland*,⁽²⁾ the bailiff and men of *Schieland*,⁽³⁾ and the bailiff and men of *South Holland*.⁽⁴⁾

SECT. VII.

Revenue. With respect to cases affecting the revenue, the ordinary courts of justice are especially excluded from any jurisdiction;⁽⁵⁾ as particular chambers, or boards, were established for this purpose. Thus matters regarding convoys, and licence duty, or the duties on imports and exports, were formerly decided by the Board of Admiralty;⁽⁶⁾ but at present by the Board of Taxes, for external and internal duties.⁽⁷⁾ Disputes relating to the excise, and other duties, are in the first instance, brought before the *Schepenen*, or Board of Magistrates, as commissioners of the local revenue, in their respective towns or districts;⁽⁸⁾ from whose decrees formerly an appeal lay to the committee of the

(1) Lams, *Handv. van. Kennemerland*. pag. 118.

(2) *Tegenw. Staat du Verren. Nederlanden*, 6 D. pag. 473.

(3) *Ibid.* 7 D. pag. 7.

(4) *Ibid.* 7 D. pag. 349.

(5) *Nad. Ampl. Instr.* Art. 31.

(6) *Plac. Gener.* 31 Julii, 1725. Art. 202, et 203.

(7) *Instr. voor deezen Raad*, van 12 Julii 1805.

(8) *Gener. Ordonn.* van 17 Jann. 1806.

States General, and afterwards to the provincial government of Holland; but as an entirely new mode of taxation is about to be introduced, the decision of all matters relating thereto, is committed to *the board for taxes*, in the last resort.⁽¹⁾*

Revenue.

SECT. VIII.

The competent tribunal for military persons, has at all times been a subject of great dispute, and much depended on the circumstance, whether there was a *stadtholder* at the head of the government or not.⁽²⁾ At present it is settled that military persons, whether employed in the land or sea service, are with respect to all civil cases or offences, subject to the civil judge, and with respect to military offences, they are subject to the high military tribunal.⁽³⁾

Military causes.

SECT. IX.

Matters which are purely of an *ecclesiastical nature*, must according to the general rule be

Ecclesiastical causes.

(1) Inst. voor gemelden Raad. Art. 20. n. 6.

(2) Judic. Pract. 1 B. 1 Hoofdst. S. 8.

(3) Staatsreg, van 1805. Art. 75. et 76.

* It is almost impossible for the Translator to find appropriate terms to give a precise idea of the respective duties of these several boards and officers; but he trusts that he has not entirely failed in the attempt.

Ecclesiastical causes.

treated according to the law of the church ; that is, first, before the consistory, next before the assembly, and lastly before the synod.⁽¹⁾ The temporal judge never interposes his authority, further, than when by defect of power in the ecclesiastical court, it becomes necessary for him to afford the assistance of the civil arm, to put a stop to any improper proceedings ; nor does the political power interfere, except in the case of religious disputes, rising to such a height, as to have a pernicious effect on the public peace and tranquillity, or to affect the government of the church as by law established, in which case, the matter was formerly referred to a special committee of the members of the States-General ;⁽²⁾ but at present to the Secretary of State for the Home department.⁽³⁾

SECT. X.

Tribunals for special matters.

Finally it remains to observe, that besides the above mentioned courts and institutions, there are yet some persons and things, subjected to particular tribunals, as

1. The disputes between parents and children in marriage cases, which are summarily decided by a special college, from whose decision when

(1) Jud. Pract. 1 B. 1 H. S. 3—6.

(2) Jud. Pract. *ibid.* S. 7.

(3) Instr. voor. denzelve, Art. 2. et 20.

it accords with the opinion of the parents, there lies no appeal.⁽¹⁾

**Tribunals
for special
matters.**

2. All matters relating to the *sea*, as well as cases of *averages*, must be brought before the commissioners for *maritime affairs*, such as are established at *Dordrecht*, *Amsterdam*, and *Rotterdam*.

3. All matters relating to *insolvent estates*, or to estates which have been entered upon by the heir, under the benefit of inventory, or to estates which have been taken possession of, and placed under the controul of the *Schepenen* or *Bench* of *Magistrates*, must be decided by the judge of the place, where the estate or property is situate, without the court being permitted under any pretence whatsoever, to withdraw it from his cognizance.⁽²⁾

4. All questions relating to real property, as houses, lands, and inheritance of the like nature, must be determined in the process *petitoire*, or process for trying the question of title, by the judge of the place where the land, &c., is situate.⁽³⁾

5. No matters relating to students, being members of the *University of Leyden*, can be brought before the court, or other tribunals ;

(1) Edict. Holl. 27 Sept, 1663. G. P. B. 2 D. Col. 3090.

(2) Resol. Holl. 10 Julii, 1677. G. P. B. 3 D. pag. 672.

(3) Groot Privil. van Vrouw Maria van 14 Maart, 1476. Art. 9.

**Tribunals
for special
matters.**

since, according to the privileges granted to the University, the students cannot appear before any other tribunal than that of the University, in any personal action, whether civil or criminal, or whether as plaintiff or defendant.⁽¹⁾

(1) Interpr. Holl. 3 Maart, 1588. Nad. Ampl. op het 39 Art. van de Statuten der Universiteit, van 24 Maart, 1662.

CHAPTER II.

Of the Commencement of a Suit, or Action at Law.

SECT. I.

ANY person who conceives that he has any legal claim, or demand against another, ought first in a friendly manner to apply to the other party to satisfy the same, either verbally, or in writing, or to make this application by means of a notarial act, or summons; which is termed an *insinuation*, which latter form, in order to have proof of a previous application or demand, before bringing the action, is most advisable.

Applica-
tion in a
friendly
manner.

In case the action is brought, without such previous demand, and the defendant offers to pay the plaintiff, he would not be entitled to costs, but on the contrary, would be liable to pay those of the defendant.⁽¹⁾

SECT. II.

In every action both the plaintiff and defendant must be persons qualified to appear in court. Therefore persons under guardianship, or curatorship, and married women, are unqualified. When therefore it is necessary to bring an action on the part of minors, prodigals, and

Power to
bring and
defend an
action.

(1) Voet, ad tit. ff. de re judic. n. 22. Van Alphen, pageg. 1 D. pag. 30. n. 7.

Power to
bring and
defend an
action.

such like persons, it must be brought in the name of their guardian or curator; and in an action against them, the subpoena is taken out against their guardian or curator. To this rule there is no exception with us, save in criminal cases, when the cause is conducted in *extraordinary process*, as it is termed, that is, when from the nature of the offence, the party is apprehended, or cited to appear in person, and as this is the usual manner of proceeding in grave cases, the minor himself must then appear personally in court, and not by his guardian.⁽¹⁾ But so soon as the criminal proceeding is changed from the *extraordinary* to *ordinary process*, in which the party is not bound to appear in person, but may appear by attorney, then the minor cannot appear alone, but must be assisted by his guardian.⁽²⁾ In like manner when the cause concerns a married woman, the husband must appear for the wife, and the subpoena be directed to him, except in the following cases :

1. When the woman is a public trader.
2. When the woman has by her marriage settlement, reserved to herself the disposition and management of her separate property.

(1) De Groot, Inleid. 1 B. 4 D. S. 1.

(2) S. Van Leeuwen in not. op den stijl van Proc. in crimin. Zaaken. Art. 61. Voet, ad tit. ff. de judic. n. 12. G. De Haas, in not. ad. S. Van Leeuwen, Cens. For. Part. 2. Lib. 1. Cap. 10. n. 12.

3. In cases wherein proceedings are pending between the husband and wife, to obtain a separation or divorce, &c.⁽¹⁾

Power to bring and defend an action.

Sometimes however it happens that a plaintiff or defendant, is unprovided with that assistance, without which he cannot appear in law. In such case, previously to instituting the suit, a *Curator ad Lites* must be appointed on petition to the court.

SECT. III.

When children conceive they have a right of action against their parents, they must first request leave from the court, which is termed *Venia Agendi*,⁽²⁾ which in the inferior tribunals is applied for by a separate petition, but in the court it is inserted in the application for the writ.

Venia Agendi, or licence to sue.

SECT. IV.

Whosoever is obliged to go into court, either as plaintiff or defendant, will find it advisable to provide himself with a *solicitor*, and if the cause is of importance and intricate, with a *counsel* also.

Advocates and attorneys at law.

Although properly no person should be debarred from maintaining his right in person,⁽³⁾ and this is the practice in some courts and before the inferior tribunals, yet to prevent dis-

(1) Regtsgel, Observ. over De Groot's Inleid, 4 D. Obs. 7.

(2) L. 4. S. 1. L. 13. ff. de in jus. voc.

(3) t'. Groot, Privil. van Vrouw Maria. Art. 6.

Advocates
and attor-
neys at
law.

order and confusion in the proceedings, this practice is not permitted before the higher courts,⁽¹⁾ and especially before the Court of Justice of Holland.⁽²⁾

No one is admitted to practice as a counsel who has not taken a doctor's degree in law at some one of the acknowledged universities,⁽³⁾ and afterwards been sworn in as an advocate before the court.⁽⁴⁾

The office of counsel consists in general in giving advice on all legal questions; to draw and sign the petitions; to advise the pleas held by the solicitor on the roll; to draw and sign the written pleadings; to plead in court; and further, to use every other legal means for the interest of his client.⁽⁵⁾

The office of the solicitors is to assist and act with the counsel. The pleas are filed at the roll in their name, they file the petitions, and act on the orders made thereon. Their duty is also to keep all the papers in the cause in clear and fair order, and to advise the counsel of the days of hearing, &c.⁽⁶⁾

(1) Keur op het Proced. te Haarlem van 11 Sept. 1751. Cap. 1. Art. 7. Ordonn. op het Proced. te Amsterdam van 29 Jann. 1779. Cap. 3. Art. 6.

(2) G. Grotii Isag. Lib. 1. Cap. 2. S. 14. Ord. van den Hove van 2 April, 1672.

(3) Instr. Hof. Art. 71.

(4) Merula, Man. v. Proce. Lib. 4. tit. 16. Cap. 1.

(5) Instr. Hof. Art. 55.

(6) G. Grotii Isag. Lib. 1. Cap. 2. n. 14 et 15.

In most courts the solicitors plead or carry the cause through the two first terms on bill and answer at the roll; but they never plead or do this before the High Court.

Advocates
and attor-
neys at
law.

Their number is generally limited, but there is no limit to that of counsel, and before the attornies hold any terms on the roll they must be provided with a proper power of attorney.⁽¹⁾

SECT. V.

As the carrying on a suit is an expensive proceeding, and it would be a hard case that any one having a good right or title in law, but no means to assert it, should on this account be barred of his right, poor persons and those who have not the means of going to law, or of procuring the assistance of a counsel or solicitor *gratis*, may by application to the court obtain an order for the assistance of a counsel and solicitor, *Pro Deo or Gratis*;⁽²⁾ but to obtain such *admission Pro Deo* a petition must be presented to the court accompanied with proof of the poverty of the petitioner, which is most usually done by annexing to the petition letters of recommendation from the judge of the petitioner's domicile.⁽³⁾

Leave to
sue in
*forma pau-
peris*, or
pro Deo.

Such application may, however, be opposed

(1) Instr. Hof. Art. 52 et 53. Ordre op de Rolle van 21 Octob. 1669. Art. 29.

(2) Instr. Hof. Art. 78.

(3) Resol. van't Hof. van 19 Sept. 1662. en 13 Octob. 1666.

Leave to
sue in
forma pau-
peris, or
pro Deo.

on the ground that the party is not so poor as he represents himself to be, or that his claim at law is manifestly groundless.

SECT. VI.

Citation
before the
inferior
tribunals.

The first step in the commencement of a suit is to issue the *subpœna* or *citation*. This act we place in the hands of the marshal of the court, and it contains—

1. The name and description of the plaintiff.⁽¹⁾
2. The name and description of the defendant.
3. The day, hour, and place at which the party is to appear.

4. The declaration or statement of the matter on which the party is cited. Sometimes the declaration is omitted in the citation, and a copy only of the claim and demand served.

The marshal serves the citation and leaves a copy of it with the defendant, or with some one of his household who has arrived at years of discretion ; or in case of not meeting with any one at the house, then he leaves it with one of the neighbours who will undertake to give it to the defendant. Having served a copy of the citation, he makes a minute thereof, and annexes it to the original, which minute is termed *the return*.

(1) Ordonn. op't Proced. in de Steden en ten platten Land an 1570. Art. 1. en aldaar. Van Leeuwen, in not.

SECT. VII.

In the town tribunals the subpoena or citation is issued by the party himself of his own authority, and without the previous knowledge of the judge; but in proceedings before the upper courts of justice, no writ or subpoena is issued without the previous order of the court on the marshal, to obtain which order it is necessary to present a petition to the court, containing,

Petition to the Upper Court for mandament or subpoena.

1. The name, residence, and description of the party, without, however, the titles of honour or distinction, such as the honourable, esquire, madam, &c.⁽¹⁾

2. A short, clear, and connected statement of the case, and of the grounds of the application.

3. The prayer or conclusion: and lastly, the clause, in case of opposition, praying for an order on the marshal to appoint a day in term for the defendant to appear in court.⁽²⁾

The petition being drawn on a proper stamp, and signed by a counsel and solicitor, is presented to the commissaries who hold the roll for the time being, who are accustomed thereon generally to order the parties before them previously to issuing the writ; in order, if possible,

(1) Ordonn. van den Hove van 8 Junij 1663. in't. G. P. B. 2 D. Col. 2926.

(2) Jud. Pract. 2 B. 1 Hoofdst. S. 1-3.

Petition to
the Upper
Court for
manda-
ment or
subpœna.

to settle the question amicably; and if they succeed, an act is then drawn in the presence of the commissaries, termed an act of *accord and agreement*.⁽¹⁾

SECT. VIII.

When their endeavours are fruitless, and there appear no reasons why the court should not take cognizance of the case, the court grants the *writ* prayed for, which consists of an act in the name of the president and members of the court, wherein is recited the entire petition, and the marshal is authorised to summon and cite the defendant in the terms of the petition.

Letters
missive.

When any order or provision of justice is sought against any department of government or public body, the court does not grant the *ordinary writ* or *subpœna*; but a letter *missive under seal*, and those therein named are not termed parties, but *persons written to* (*Beschrevenen*).⁽²⁾

SECT. IX.

Marshal.

The orders and appointments of the court are served by an officer termed the marshal.⁽³⁾

(1) Jud. Pract. 2. B. 1 Hoofdst. S. 4-6.

(2) G. Grotii Issag. Lib. 1. Cap. 4. n. 11 et 12. Bynkershoek, de For. Legat. Cap. 16. Bell. Jurid. Cas. 31. pag. 188. seqq.

(3) Judic. Pract. 2 B. 2 Hoofdst.

These marshals are of two kinds, viz. the two Marshal.
first marshals, or *duerwaarders*, who daily attend the court, and serve the writs and orders thereof at the *Hague*, and within its jurisdiction.

The others are termed the *ordinary duerwaarders*, of whom some reside at the *Hague*, and others in the different towns of Holland.

When the order or writ is placed in the hands of the marshal for service, he repairs with his staff of office to the residence of the party, or to the place where he is at the time, and makes known to him the order, and requires compliance therewith; and in case of opposition, he appoints him a day to appear in court, at the same time handing him a copy of the order with a short minute thereon of the service thereof, and of the day appointed for hearing. This day is fixed for the Monday fourteen days, at least, or at the furthest *one* month after service of the order or citation.⁽¹⁾

In the inferior tribunals, and in the country, it must be at least *three* days before.⁽²⁾

It may happen that a party over whom the Edict.
jurisdiction of the court is acquired by arrest or otherwise, lives or is domiciled out of the jurisdiction; in which case, he is cited by *edict*, that is, from the court-house of the place

(1) Ampl. Instr. Art. 9. Reglem. van 28 Maart, 1680. Art. 6.

(2) Ord. op't Proced. in de Steden, &c. Art. 1.

Edict.

situated at the extreme limits of Holland nearest the domicile of the party, where a copy of the citation is fixed, and another copy sent to him by the ordinary post, under a receipt from the postmaster.⁽¹⁾

The day fixed for appearance or return to the writ, in this case, is at the expiration of three or four weeks, according to the distance at which the party resides.

Letters
requisito-
rial.

If it be necessary to cite any one before the town tribunals who is domiciled or resides at another place, the practice is not to summon him by *edict*, but by *letters requisitorial*, addressed to the judge of the place where the party resides, praying him to cause the citation to be served by his own officer.⁽²⁾

Edict *ad*
Valvas
Curiae.

When the persons to be cited are unknown, or we are ignorant of their respective places of abode; for instance, when a mandament is prayed for by any one from the court, to be declared entitled to the inheritance of a person who has died *intestate*; in such case, all persons must be cited to appear, whether living within or without the jurisdiction of the court, who may claim any right or title to, or interest therein.

This citation must issue from the court-house at a term of *six weeks*,⁽³⁾ and is besides published

(1) Judic. Pract. 2 B. 2 Hoofdst. S. 4 et 5.

(2) Amsterd. Secret. 10 Hoofdst.

(3) Ordon. van den Hove van 10 Sept. 1732.

in the gazette. Such citation is termed a citation by edict *ad valvas curiæ*. Edict *ad Valvas Curie*.

SECT. X.

Before the day fixed for the return of the writ, the attorney for the plaintiff presents or gives in to the secretary's office a paper in which are written the names, residence, and description of the respective parties, the name of the solicitor, the roll to which the cause belongs, and the question to be decided. This paper is termed a *presentation*.⁽¹⁾ Presenta
tion.

In most places where there are few causes only, one roll is kept. But in the court of Holland, there are seven:—the ordinary roll—the extraordinary roll—the roll of pleadings—the roll of decrees—the *furneer rolle*, or roll for production and exchange of vouchers—the roll of the attorney-general in civil causes, and the same in criminal causes.⁽²⁾ At *Amsterdam*, we have the court roll—the ordinary roll—the privileged roll—the small roll—the roll of induction, and attermination of cession and benefit of inventory—the schouts' or sheriff's roll—the impost roll—and the extraordinary roll.⁽³⁾ The roll.

At *Haarlem*, there is the schouts' criminal

(1) Judic. Pract. 2 B. 3 Hoofdst. S. 1.

(2) Ibid. S. 2.

(3) Ordonn. op de Manier van Proced. te Amsterdam, van 29 Jan. 1779.

The roll. roll—the schouts' civil roll—the burghers' roll—the marriage roll—the extraordinary roll—and the May roll;⁽¹⁾ and thus different places have their peculiar regulations.

SECT. XI.

Claim and demand.

The cause being presented at the roll, and the day for return of the writ having arrived, the solicitor for the plaintiff must file at the roll court his *claim and demand* or *declaration*. In the court of Holland the declaration is inserted in the writ. In the inferior courts the declaration precedes the claim. This is framed according to the nature of the action, and the forms used in such cases, which at all times must be altered and modified according to the circumstances.⁽²⁾

The prayer or conclusion in all pleadings generally ends with the words, “*or for such other, &c.*” to leave the judge thereby at liberty to alter or amend any too general, or doubtful expression, or supply any thing in the wording.⁽³⁾

Minutes.

The attorney, on filing his claim and conclusion, causes a short note or minute to be written by the secretary, in the margin of the *presentation* given in by him, as for example, *A. files claim*

(1) Keur op de Manier van Proced. te Haarlem, van 11 Sept. 1751. Cap. 4.

(2) Jud. Pract. 2 B. 3 Hoofdst. S. 7. en 6 Hoofdst. S. 3-9.

(3) Voet, ad tit. ff. de edend. n. 13.

and *demand*, requests provision thereon, and concludes *prout in scriptis*. Minutes.

He also hands over a copy of this claim to the solicitor of the other party.

SECT. XII.

It is often the custom to annex to the claim, and demand a request of *provision or namp-tissement*; that is, that the defendant shall, during the proceedings, and before final sentence, be decreed by an interlocutory or provisional sentence to pay to the plaintiff the sum in question, under proper security, to be repaid this with interest at four per cent, in case, by the final judgment on the merits, this sum⁽¹⁾ shall not be found due or judgment go for the defendant. Provisional payment, or Namp-tissement.

To determine whether or not provision should be granted, the two following rules are to be observed.

1. That with respect to the plaintiff, a provision should never be granted in his favour, unless he be provided with a clear proof in law of his demand; for example, an acknowledged signature of the defendant's to a bond or other instrument; a merchant's account books, when

(1) De Groot, Inleid. 3 B. 5 D. S. 7. S. Van Leeuwen, Aanteek, op het 10 de Art. van de Ordonn. op het Proced. in de Steden, &c.

Provisional
payment,
or *Namp-*
tissement.

the sale and delivery is not denied by the defendant. But declarations and other vague evidence are not sufficient.

2. On the part of the defendant, to prevent provision or *namptissement* being decreed against him in such cases, he must produce such counter-proofs as appear to the judge to render it probable that the plaintiff will not succeed on the merits. This, therefore, depends less on the nature of the proofs than on the effect they produce on the mind of the judge. Provision is, therefore, properly refused to a swindler, although he produce an instrument with the acknowledged signature of the defendant, when the latter brings forward such proofs as make it appear probable to the judge that there has been some fraud or deceit in the transaction.⁽¹⁾

The plaintiff, when he seeks provision, or *namptissement*, is accustomed to deliver to the marshal, to be served at the same time with the citation, copies of all the vouchers on which he founds his claim of provision, in which case the defendant is bound, on the day of hearing, immediately to answer to the claim of provision. If such copies are not served with the citation, then the defendant is at liberty, previously to answering on such claim, to demand copy

(1) Judic. Pract. 2 B. 6 Hoofdst. S. 13.

and sight of the papers whereon this claim is grounded, and day after to answer.⁽¹⁾

Provisional
payment,
or *Namp-
tissement*.

SECT. XIII.

All that we have just mentioned takes place when both parties appear at the return of the writ; but let us see what is the course when one of the parties, either plaintiff or defendant, does not appear.

Comparuit
and
default.

If the plaintiff be in default, then the defendant prays *comparuit* or *default* against him, by which he is *non-suited*, the consequence of which is that that the defendant is absolved *from the instance*, as we term it, and has his costs.⁽²⁾

If the defendant does not appear, then the plaintiff prays *default* against him. The number of such defaults, and effect of them, is different according to the nature of the action and proceedings. In summary cases *one* default is sufficient; in others again *two* are necessary; in others *three*; and in a regular ordinary action at law, *four* defaults are necessary to obtain final judgment by default. The effect of the first default is another citation, of the second default a third citation; the benefit of the third default

(1) Van Alphen, Papeg. 1 D. pag. 21. n. 5. Merula, Manier van Proced. Lib. 4. Tit. 24. Cap. 14. S. 13. n. 29. in not.

(2) Instr. Hof. Art. III. G. Grotii, Issag. Lib. 1. Cap. 7. S. 33-35. Merula, Man. van Proced. Lib. 4. Tit. 31. Cap. 1. S. 3.

Comparuit
and
default.

is permission to the plaintiff to lay over his intendit, and to issue a fourth citation, *ex superabundanti*, to see the plaintiff verify his intendit. The benefit of the fourth default is an act to annex to the intendit.

Intendit.

By this intendit is understood a writing containing a statement of the case, of the proceedings thereon, and of the defaults granted; and finally, a conclusion, which is always inserted thereon, that the defendant shall be barred from all pleas or exceptions, peremptory, declaratory, or dilatory; and also from all means of defence in law which he otherwise might have availed himself of had he appeared; and further, with respect to the cause itself or the merits, that he be condemned conformably to the nature of the case and demand.⁽¹⁾

This intendit is, together with the vouchers, under inventory, given in to the judge.

In case the defendant appears on the second or third citation, he is at liberty to request leave to purge the defaults granted against him, which is generally consented to on the part of the plaintiff, on condition that the effects remain, and on payment of the costs incurred.⁽²⁾ On the fourth citation this is not permitted, without

(1) Van Alphen, Papeg. 1 D.5 Hoofdst. pag. 754. seqq.

(2) Merula, Manier van Proced. Lib. 4. Tit. 33. Cap. 1. S. 11.

a regular order of the court on application for relief.⁽¹⁾ Intendit.

SECT. XIV.

On the return-day of the writ, if the defendant appears, it is the custom for him to take a copy of the claim and demand, and pray leave to imparl, or day of deliberation, (*dag van beraad*). This term, with the court and the town tribunals, is to the next day in term or court, or fourteen days. This indulgence is never denied to the defendant, unless at the time of serving the writ a statement is served of the grounds on which the plaintiff founds his claim for provision, (and then the defendant is bound to answer immediately on the return of the writ,) or unless by order of the court, for special reasons, he is bound to join issue on the first court day.⁽²⁾ Impar-
lance, or
day of de-
liberation.

Very frequently it happens that the defendant is not content with an imparlance, but previously to answering makes one or more preliminary requests. Prelimi-
nary
requests.

The principal of these are the following :⁽³⁾

1. Sight or copy of the power from the plaintiff to his attorney.

(1) Judic. Pract. 2 B. 3 Hoofdst. S. 12.

(2) Judic. Pract. 2 B. 4 Hoofdst. S. 2.

(3) Judic. Pract. *ibid.* S. 3. en volgg.

Prelimi-
nary
requests.

2. Copy of the quality of the plaintiff ascribed by him to himself in the citation.

3. Copy of the documents of which the day and date are mentioned in the claim and demand.

4. Copy of the vouchers on which the claim for provision is founded.

5. Copy of the return of the marshal to the writ or citation.

6. Explanation of any doubtful or indefinite expressions occurring in the mandate or claim and demand.

7. Security for the costs, and for answering to the counter claim of the defendant, in reconviction or cross action, and submission to the jurisdiction of the court in which the original action is brought, in case the defendant should have any counter-claim or demand.⁽¹⁾

This request is usual when the plaintiff is an alien or foreigner, and not naturally subject to the jurisdiction of the court in which he brings the action. Since, however, it may happen that the plaintiff may not be able to find any persons within that jurisdiction to become security for him, in such case, instead of personal security, he is allowed to give security by oath (*cautio juratoria*), that is, he not only

(1) Voet, ad tit. ff. qui. satisd. cog. n. 1.

engages under oath to pay the costs in case he should be condemned therein, but also declares under oath that after all possible endeavours on his part, he has not been able to find any person within the jurisdiction to become his security.⁽¹⁾

Preliminary requests.

8. Choice of a place within the jurisdiction, wherein citation may be served, or execution levied.

This, in the case of foreigners or strangers, when plaintiffs, is generally termed a request of *Electie van domicilium citandi et exequendi*.

As the sole object of these requests on the part of the defendant, is frequently mere delay, the rule in practice is, that they be made on the first day of appearance, and all together.⁽²⁾

SECT. XV.

The day of deliberation or time to imparl having expired, the defendant is bound to propose *his plea*, or *exception*, or *to answer to the claim*, and even notwithstanding such plea or exception, to make his conclusion or answer on the main question. This rule is, however, subject to some exceptions in respect to certain

Exception, or plea.

(1) Voet, d. t. n. 4. in fin.

(2) See our Aanteek, op Merula, Man. van Proc. Lib. 4. Tit. 38. Cap. 1.

Exception,
or plea.

pleas in which the defendant is allowed to persist without answering over ;⁽¹⁾ namely :

1st. The exception or plea of incompetency, and *Renvoi* or plea to the jurisdiction, when the defendant conceives himself to be brought before a court not competent, and that the cause ought to be referred to another tribunal.

2d. The plea of *Lis pendens*, on the ground that the same case, between the same parties, and arising from the same cause of action, is already pending before another judge.

3d. The plea of *Lis finita*, or that the same question, and between the same parties, has already been decided by a sentence which has become a judgment.

4th. The plea of submission to arbitration.

5th. Compromise and mutual release by agreement between the parties.

6th. Award of arbitrators in the same matter.

7th. In appeals the plea of non-prosecution during the time allowed for appeals, or of homologation and acquiescence in the original sentence, by the appellant having already, wholly or in part, satisfied the judgment, and consequently abided by it.

8th. The plea of not admissible in appeal, on the ground that the sentence according to law is not appealable ;⁽²⁾ and,

(1) Instr. Hof. Art. 86. Ampl. Instr. Art. 10.

(2) Van Alphen, Papeg. 1 D. pag. 303.

9th. The exception of *Non qualificatie*, or a plea in abatement, on the ground that the plaintiff has not the quality which he has thought proper to ascribe to himself in his declaration.⁽¹⁾ Exception,
or plea.

All these pleas or exceptions must be distinctly proposed, *et nominatim*, and are therefore termed *nominate exceptions*.

But there are some besides these which are termed *innominate exceptions*, to propose and give effect to which there has been introduced into practice, a conclusion termed a *conclusion to absolution of the instance*, which, among others, is often made use of before the tribunal of Amsterdam. This conclusion is properly taken when we conceive that the party has instituted a wrong action ;⁽²⁾ but the defendant is not at liberty to persist by this conclusion, as by a

(1) G. De Haas. Nieuwe. Hol. Cons. No. 17. pag. 285. seqq.

(2) Some persons, confounding the two exceptions of *Tibi adversus me non competit actio*," et "*Tibi adversus me non competit hæc actio*," think that in the former case we may conclude to an *absolution of the instance* ; whereas it should be followed by a contrary conclusion, or rejection of the plaintiff's demand. And a conclusion to absolution of the instance* only properly applies when the defendant may say "*Tibi adversus me non competit hæc actio*."

* The contrary conclusion is equivalent to our plea of general issue, and the absolution of the instance to the plea in abatement.—T.

Exception, or plea. peremptory plea, but is bound nevertheless to answer over on the main question.⁽¹⁾

SECT. XVI.

Answer. When the defendant has none of these exceptions to propose, but nevertheless conceives that he is entitled to consider the claim of the plaintiff as entirely groundless, and to join issue thereon, he does so, by concluding as follows: “ *That the claim and demand of the plaintiff be rejected with costs.* ”⁽²⁾

If, however, a conclusion so positive and general cannot be taken against the claim of the plaintiff, but that in one or more points it seems well founded, then it is more prudent in the defendant, to make a tender at the roll court to the plaintiff, of what he conceives is really due to him, i. e. a *presentation*, and which he trusts will be held sufficient, and under benefit of which he *further* or *otherwise* concludes as before.⁽³⁾

SECT. XVII.

Barring of answer of defendant. When the time to answer is come, and the defendant is in default, the plaintiff can compel him thereto by request, at the roll, of *bar of answer*, the effect and advantage of which is,

(1) Instr. Hof. Art. 88. Ampl. Instr. Art. 10.

(2) G. Grotii Isag. Lib. 1. Cap. 9. S. 10.

(3) Judic. Pract. 2. B. 4 Hoofdst. S. 9.

adjudging to the plaintiff, the *provision* sought by him, with *admission on the main question* to file his *intendit*, and *another citation to the defendant*, to see it verified. Barring of answer of defendant.

Sometimes the effect of this barring of answer by default, namely, in summary cases, in which only one default is necessary, is the *adjudication of the plaintiff's claim*.⁽¹⁾

In the high court these defaults are granted, generally saving to the defendant the power to clear them within fourteen days, but with the inferior tribunals they are mostly peremptory.

SECT. XVIII.

It frequently happens that the defendant has some demand against the plaintiff, in which case he is at liberty to bring before the same court his claim, by a cross action termed *re-convention*,⁽²⁾ and the plaintiff is not at liberty to plead to the jurisdiction in this case. This is done before answer in the original action, and then the pleadings go on together. *Re-convention, or cross-action.*

There are however some cases in which no *re-convention* can take place.⁽³⁾

1. When the plaintiff in the original action,

(1) Judic. Pract. *ibid.* S. II.

(2) Voet. ad. tit. ff. de judic. n. 78. seqq.

(3) Jud. Pract. 2 B. 4 Hoofdst. S. 13.

Re-convention, or cross-action.

does not sue on his own account, but as agent for another, and the claim is against him individually.

2. When the judge before whom the original action is brought is incapacitated, by the limited nature of his jurisdiction, from taking cognizance of the claim in the cross action.

3. In some possessory cases, as for instance, of *complaint* and *spoliation*, re-convention is not admissible.*

4. In appeal cases, since the inquiry in appeal should be limited to the question, decided by the court below. However, reconvention on sufficient grounds being shown, is sometimes permitted in this case, under the benefit of relief.⁽¹⁾

5. In cases of penal interdict or injunctions, no re-convention is allowed, but if the defendant conceives that he also has a right to obtain a penal interdict against the plaintiff, he must do so by a separate proceeding.

6. Neither can re-convention be admitted in execution, or proceedings by *gyzeling*, or civil attachment.

(1) See our Aanteek. op Merula, Lib. 4. Tit. 43. Cap. 6. §. 6.

* For, the nature of these cases does not admit of delay—on the principle that “*Spoliatus ante omnia est restituendus*.—See also *l. Si Maritus* 10. Cod. de donat. inter virum et uxorem.

7. Nor in reversion, or new trial.
8. Nor lastly, in criminal cases.

*Re conven-
tion, or
cross-
action.*

SECT. XIX.

When the defendant has by his plea or answer, denied the claim and demand of the plaintiff, with or without re-convention on his part, it then becomes incumbent on the plaintiff, to negative this plea or answer of the defendant, by filing his *replique* at the roll. To answer this the defendant has a term to file his *duplique*, and upon this issue is joined, and no further terms are allowed to the parties.⁽¹⁾

*Joining of
issue.*

In case there is any request on the part of the plaintiff of *provision* in the cause, this question is first and separately decided upon verbal pleadings; the cause on the main question remaining suspended during the time.⁽²⁾

*Pleadings
on provi-
sional or
interlocu-
tory order.*

It sometimes happens that in place of the original defendant, another person on account of having the chief, or a considerable interest in the cause, takes it upon himself. This is termed *intervention*, or that the original defendant, still remaining a party to the suit, this third person, on account of the interest he has in the cause, becomes also a party to it.⁽³⁾

*Interven-
tion, or
inter-
pleading.*

(1) Merula, Manier van Proced. Lib. 4. Tit. 46. Cap. 1.

(2) Judic. Pract. 2 B. 5 Hoofdst. S. 3.

(3) Jndic. Pract. ibid. S. 4.

SECT. XX.

Manda-
ment of
debt.

A person who is privileged to cite any party, in the first instance, in the court of Holland, instead of the inferior and ordinary tribunals, as for instance, a widow, a minor, &c., and having different claims against various persons, should properly, according to the general rule, take out a separate citation against each; but as by this mode of proceeding, many unnecessary costs are incurred, in order to lessen these, a practice has been introduced to consolidate the proceedings, by taking out a general citation for the whole, under which they may all be brought before the court; this is termed, a *mandament of debt*.⁽¹⁾

(1) Van Alphen, Papeg. 1 D. 2 Hoofdst. pag. 70-74. Judic. Pract. 2 B. 7 Hoofdst.

CHAPTER III.

*Of Causes which are decided in a Summary Way
and without Interchange of Vouchers.*

SECT. I.

IN the court there was little or no difference observed, in the mode of proceeding in great and small causes, and the *ordinance* which was formerly published, regulating the manner of proceeding in small causes,⁽¹⁾ has almost wholly fallen into disuse. The difference at present is merely this, that causes under one thousand guilders, are neither pleaded in court, nor by memorials, nor in writing, but are simply pleaded before two commissaries.⁽²⁾

Great and
small
causes.

In most of the small towns, and in the country, the great and small causes are conducted in the same manner, to the great inconvenience of the parties, who are thereby subjected to very grievous costs.

In the larger towns particularly commercial ones, this inconvenience has been felt, so as to cause some remedy, and the mode of proceeding in small causes, has been regulated by several

(1) Ordonn. en Instr. op de vorderisfe van kleine Zaaken, van 21 Decemb. 1579. in't G. P. B. 2 D. fol. 762.

(2) Regl. van't Hof, van 9 Maart 1728. Art. 7.

Great and
small
causes.

special ordinances, and in some places, even a separate and distinct court, has been erected for them.⁽¹⁾

SECT. II.

Summary
causes.

There are some kinds of causes which, however, notwithstanding this blending of great and small causes, admit neither of the formalities in the proceedings, nor of the costs of ordinary causes, and are therefore decided in somewhat of a summary way, chiefly by not permitting after joining issue, the production or exchange of vouchers, but by pleading the case without this exchange, before commissaries at the roll. We shall here notice the principal of these.

Taxation
of costs.

1. A citation or summons to tax costs. A counsel or attorney who is unable to obtain payment from his client, prays only an appointment or declaration by the court, of what is due to him as salary (*appointement in cas van salaris*).⁽²⁾

When the party who has been condemned in the costs of suit has a solicitor, a bill of costs is merely given in, by the solicitor of the opposite party. The solicitor of the defendant thereupon gives in his objections in diminution, and the other

(1) Handv. van Amsterdam, 2 D. 3 B. 4 Hoofdst. pag. 671. en volgg. Ordon. op de Vredemakers—Kamer te Rotterdam van 6 Junii 1635, en de Ampliatien op dezelve. Keuren van Haarlem. 2 D. pag. 33.

(2) Judic Pract. 2 B. 8 Hoofdst. S. 2.

party files his answer thereto, and then the judge proceeds to tax the same.⁽¹⁾ Taxation of costs.

But if the defendant has no solicitor, he is then summoned to take over the bill of costs; having declared his readiness so to do, or being condemned thereto, he then files his objections in diminution, as before mentioned. In this proceeding there is but one default, whereof, also as of the barring of answer, the benefit is that the defendant loses his right of objecting to the amount of costs.⁽²⁾

SECT. III.

2. Citation to hear judgment passed.

When in any notarial act, deed, or instrument, a clause is inserted of *willing condemnation*, i. e. to confess judgment on the covenants in the deed whenever called upon, without defence, and persons are named therein to act as attornies for the respective parties, and to request and suffer condemnation in their names before the commissaries of the court to whose jurisdiction they have submitted themselves by this act, in this case no summons or citation is necessary, but the persons named as attornies therein, deliver the act to the judge (or commissaries) for this

Citation to see condemnation passed, or confession of judgment under a warrant of attorney.

(1) Judic. Pract. 2·B. 8 Hoofdst. S. 3 et 4.

(2) Instr. Hof. Art. 118 et 195.

Citation to see condemnation passed, or confession of judgment under a warrant of attorney.

purpose, who, if there are no good reasons to the contrary, grant the condemnation.⁽¹⁾

It may, however, happen that to obtain this condemnation a citation is necessary ; namely, when the procuration or power in the deed for this purpose is void by the death of one of the party who has passed it ; when one or both of the persons named as attornies is dead ;* when the power is revoked by one of the parties ; or when the judge, doubting the validity of the act, refuses to grant condemnation on it without hearing the opposite party.

In all these cases a summons is taken out *to hear condemnation passed*, in which proceeding there is only one default, the benefit of which is the decreeing of condemnation on the act with costs.⁽²⁾

SECT. IV.

Citation for execution of a superannuated sentence, or *Scire Facias*.

3. Citation *to hear execution decreed*.

This takes place, 1st. When the decree or sentence of which the execution is sought has become superannuated. The sentences of the

(1) Judic. Pract. 2 B. 9 Hoofdst. S. 1 et 2.

(2) Judic. Pract. *ibid.* S. 3 et 4.

* The safer practice to obviate this seems to be to appoint the two senior or junior clerks of the court specially for this purpose, *i. e.* the one to pray condemnation, and the other to consent thereto.—T.

court cannot be executed without a *Scire Facias* after five years.⁽¹⁾ Those of the town and village tribunals become superannuated after one year. The sentences of the tribunal of Amsterdam never become superannuated.⁽²⁾

Citation for execution of a superannuated sentence, or *Scire Facias*.

2ndly. When the party condemned is dead, or by being placed under curatorship has lost the *legitimam personam standi in judicio*. In this case the decree before it can be put in execution must be declared executable against the heir or curator.

It deserves to be remarked that in order to revive a judgment of an inferior tribunal it is not necessary to apply to that tribunal, but application may be made direct to the court, which is entitled⁽³⁾ to grant the *scire facias* and also to execute it.

The manner of proceeding in this case, is the same with that of hearing condemnation decreed, whereof we have already spoken.⁽⁴⁾

SECT. V.

4. Citation to *institute an action*.

When any one publicly pretends that he has

Citation to institute an action, or obtain a decree of *Perpetuum Silentium*.

(1) Ampl. Instr. van 21. Decemb. 1579. Art. 30.

(2) Certificate bij forme van Turbe, van 7 Octob. 1592. in de Handv. van Amsterdam, 2 D. pag. 557. seqq. Loenius, Decis. en Observ. Cas 62. en aldaar Boel, in not.

(3) Instr. Hof. Art. 118.

(4) Judic. Pract. 2 B. 10 Hoofdst. S. 3.

Citation to
institute
an action,
or obtain
a decree of
*Perpetuum
Silentium*.

an action against us, but neglects or refrains from bringing it, a mode has been introduced into practice, compelling him by a citation for this purpose to bring such action, if he conceives he is entitled so to do, within six weeks, before the court, or before the judge of our domicile, or in default to do this, to be barred therefrom, and *perpetual silence** imposed upon him.⁽¹⁾

(1) Van Alphen, Papeg. 1 D. 5 Hoofdst. pag. 83. seqq.

* This remedy seems borrowed from the Roman Law under the *Lex Diffamari* Cod. lib. 7. tit. 14. l. 15, by which a person, whose title to be considered as a free man was improperly or maliciously called in question, could compel the calumniator to prove his word in court, or to be enjoined perpetual silence. The suit of *Jactitation* of Marriage in the English Consistory Court seems also founded on the text of the Roman Law; but although in the argument in the Duchess of Kingston's case, a great discussion took place upon the effect to be given to the previous judgment in the Consistory Court in the suit of *Jactitation* of Marriage brought by the Duchess, yet there appears not a word therein of reference to the origin of this mode of proceeding, or whence it derived its authority. The words of the original text are as follows:—

“*Diffamari statum ingenuorum seu errore seu malignitate quorundam periniquum est præsertim cum affirmes diu præsidem unum atque alterum interpellatum à te vocitasse diversam partem ut contradictionem faceret, si defensionibus suis confideret:—unde constat merito Rectorem provinciæ commotum allegationibus tuis, sententiam didisse, ne de cætero inquietudinem sustineres. Si igitur adhuc diversa pars perseverat in eadem obstinatione: aditus præses provinciæ, ab injuriâ temperari præcipiet.*”—Cod. 7, 14, 5.

The Bills in Equity also of *Quia timet*, and to perpetuate the

In this proceeding there are but *two* defaults. The benefit of the first default is another citation, and of the second, the condemnation of the party cited to institute his action.⁽¹⁾

Citation to institute an action, or obtain a decree of *Perpetuum Silentium*.

SECT. VI.

5. Citation in case of *warranty*.

Citation in case of warranty.

When any one has bought any real or immoveable property, the right of property in which is afterwards claimed by another, or whereon any mortgage, servitude, or any other real right is claimed, and which was concealed by the vendor at the time of sale, the vendee in such case has the right, when thus disturbed in his possession, to call upon the vendor in warranty to indemnify him, and save him harmless.⁽²⁾

This sort of cases is also summarily treated. They are pleaded at the roll without exchange of vouchers, and there are only two defaults; the benefit of the second being condemnation in the warranty.⁽³⁾

(1) Jud. Pract. 2 E. 11 Hoofdst. S. 3.

(2) T. t. ff. de eviction.

(3) Judic. Pract. 2 B. 12 Hoofdst. S. 3.

testimony of witnesses, seem borrowed from this—and it is to be presumed that in the Dutch ceded colonies, where the Roman Law is in force, this action would lie for a person of colour in the *bona fide* possession of reputed freedom when his state was questioned. See page 62, Treatise on Roman Law of Manumission, by Translator, above quoted.—T.

SECT. VII.

Citation to
revive.

6. Citation to revive a suit.

In case one of the parties either plaintiff or defendant dies during the proceedings, the suit abates, and the proceedings cannot be continued against his heirs, without an order of revivor against them.

This case is also one of those, which is conducted at the roll without exchange of vouchers, and admits of only *two* defaults. The effect of the last, is to bar the heirs from being heard on the point last in issue, between the original parties in the cause, and on which a day of hearing had been appointed.⁽¹⁾

SECT. VIII.

Citation to
appoint a
solicitor in
the cause.

7. *Citation to appoint a solicitor.*

As by the death of one of the parties, his power or procuration becomes void, so, in like manner, it becomes void by the death of the party to whom the power was given, or by his giving it up. In this case the opposite party is under the necessity of citing the other to appoint a new attorney, in order to proceed in the cause.

The proceedings in this case are similar to those in revivor, only with this difference, that but one default is granted against the defendant,

(1) Judic. tract. 2 B. 14 Hoofdst. S. 3.

who, if he appears, has no right to demand *a day of deliberation*,⁽¹⁾ and the benefit of this default is to bar him on the last question, for which a day of hearing had been appointed.⁽²⁾

Citation to appoint a solicitor in the cause.

SECT. IX.

8. Mandament of *evocation* (*writ of certiorari*).

When any one can show that either through partiality, or for other cause, in a process which is then pending before any inferior court, justice has been denied or improperly delayed, he is at liberty to apply to the court for this writ, to order the proceedings in the cause to be brought before them.

Writ of *Evocation*, or *Certiorari*.

This petition is, in the first place, transmitted with a letter missive to the court below, to decide the cause within a short limited time, or to explain to the court their reasons for not doing so, on failure of compliance wherewith, the court grants a second letter to admonish them on pain of *evocating* the cause, and this not being attended with any effect, the writ of *evocation* or *certiorari* issues.⁽³⁾

In this instance there is but one default, the effect of which is, the removal of the cause with the proceedings into the court above.

(1) Acte van de Staaten van Holland van 18 Dec. 1582. in't. G. P. B. 2 D. fol. 1422.

(2) Judic. Pract. 2 B. 15 Hoofdst. S. 2.

(3) Van Alphen, papeg. 1 D. 13 Hoofdst. Judic. Pract. 2 B. 17 Hoofdst.

CHAPTER IV.

Of Arrests and Penal Interdicts.

SECT. I.

When arrests take place.

ALTHOUGH the general rule is that no one shall be sued or proceeded against but before his natural judge, or judge of his ordinary domicile, there are, however, sometimes cases in which there is a departure from this rule by means of *arrest*. The grounds of a proceeding by arrest are of two kinds :

1. *Either* for security of the debt (*in securitatem debiti*), and in this case it is requisite that there be a suspicion of flight (*suspectus de fugâ*), whether the party be in the immediate act of absconding, or preparing to do so ;⁽¹⁾

2. *Or* for the purpose of giving jurisdiction to the judge who grants it, and who otherwise is not competent ; *i. e.* not the natural judge of the party arrested. This proceeding is resorted to chiefly in the case of foreigners.^{(2)*}

(1) Voet, ad tit. ff. de in jus voc. n. 18. ibique. Supplem. nostrum.

(2) Voet, ad d. t. n. 22 et 23. Bynkershoek, de For. Legat. Cap. 2.

* For observations on the practice of the Court of Chancery

SECT. II.

Some persons and things, however, are privileged from arrest. Privilege
from
arrest.

1. The persons, servants, and goods, of foreign ambassadors and ministers in this country, who, if they contract any debts, are not subject to arrest or detention, either on their arrival or during their residence, or at their departure.⁽¹⁾

2. The deputies to the assembly of their High Mightinesses, and all other colleges of the States General:⁽²⁾ also the deputies to the States of Holland⁽³⁾ had formerly the privilege of freedom from arrest, and it is clear, that since the change of government, this privilege must be extended to the members of the present high colleges or assemblies.

3. Two inhabitants of the same province, town, place, or district, are not at liberty to

(1) Waarsch, van de Staaten Generaal van 9 Sept. 1679. in't G. P. B. 3 D. fol. 310. Loenius, Decis et Observ. Cas. 82.

(2) Resol. Gener. 27 Julii 1635. G. P. B. 7 D. fol. 55. Resol. Holl. 3 Meij 1680, en 3 April 1723. G. P. B. d. 1. fol. 65 et 66.

(3) Resol. Holl. 4 Octob. 1588. en 23 Julii 1653. G. P. B. 7 D. fol. 54 et 55.

to found its jurisdiction in many cases on the doctrine of *agere in personam*, see case of Odwin and Forbes, pag. 15 et seqq. et p. 170—also Voet, ad ff. L. 2. 4. 22.

Privilege
from
arrest.

arrest each other out of the jurisdiction ;⁽¹⁾ and with respect to *Utrecht*⁽²⁾ and *Zealand*,⁽³⁾ there are express conventions on this head.

4. Whether the inhabitants of the large towns of Holland are liable to arrest in the country, is a question. The most generally received opinion is, that the exception is not grounded unless the inhabitants of a large town can show that by some special privilege they are freed from arrest, as those of *Dordrecht*, *Delft*, *Leyden*, *Amsterdam*, and some other towns.⁽⁴⁾

5. All those who have the special privilege of being sued only before the higher court or their own peculiar court; for instance, officers of the court, students of the university, and the like, are not subject to arrest by other courts, particularly inferior ones.⁽⁵⁾

6. Military persons, particularly officers and the like, departing to join their regiments, are free from arrest.⁽⁶⁾ However, they are subject

(1) Voet, ad tit. ff. de in jus. voc. n. 45.

(2) Verdrag tusschen de Staaten van Holland en Utrecht van 23 Augustus 1657. Van. Alphen, papeg. 1 D. pag. 351.

(3) Provis. Accord tusschen Holland en Zeeland van 11 Junii, 1674. Art. 5 et 8.

(4) Bynkershoek, Quæst. Jur. Priv. Lib. 1. Cap. 15. Van De Wall, Handv. van Dordrecht, 1 D. pag. 39-42. et pag. 70. Judic Pract. 1 D. 2 B. 18 Hoofdst. S. 2. n. 5. pag. 273 et 274.

(5) Voet, ad tit. ff. de in jus. voc. n. 39 et 42.

(6) Voet, ad d. t. n. 39.

to a deduction of part of their pay in favour of their creditors.⁽¹⁾

Privilege
from
arrest.

7. In the public funds, or offices, no attachments can be executed on public security, bonds, debentures, annuities, or on the interest due thereon, or arrears in the hands of the receivers, or public accountants, who are not bound to take any notice thereof.⁽²⁾

When, however, any security of this nature has got into the hands of another, *mala fide*, a petition may be lodged at the office of the receiver or accountant to stop it when presented.

8. Nor are any arrests or attachments allowed on monies or effects placed in the exchange bank at *Amsterdam*.⁽³⁾

9. Nor upon seamen's wages,⁽⁴⁾ nor on the salaries or monthly wages of persons in the service of the East India Company.⁽⁵⁾

SECT. III.

The same mode of proceeding in case of laying an arrest in the inferior tribunals is not

Arrests by
inferior
courts.

(1) Judic. Prac. 2 B. 18 Hoofdst. S. 2. n. 7. pag. 274 et 275.

(2) Waarsch. Holl. 18 Maart, 1661. G. P. B. 2 D. col. 2639.

(3) Octroij 16 Dec. 1670. Handv. van Amsterdam, 2 D. pag. 674.

(4) Waarsch. Holl. 8 Dec. 1653.

(5) Octroij Holl. 9 Mëij, 1674.

Arrests by
inferior
courts.

every where observed. Arrests on goods are mostly made by the party of his own authority by placing the necessary act in the hands of the officer;⁽¹⁾ but arrests of the person require the previous consent of the judge, or president of the court, or head officer, or bailiff of the district, according to the usage of the place.⁽²⁾ In many places the practice requires that the writ of arrest should be returned to the tribunal within a short time on pain of nullity.⁽³⁾ The South and North Holland practice differ in this; that in South Holland, (according to the practice of the court,) no writ of arrest issues without a citation being also added to it to answer the claim in *Rau-Actie*, i. e. on the merits. But in North Holland, according to the Amsterdam practice, the process of arrest is a simple process, although the party arrested is at liberty to call the other party before the judge to show cause for the arrest.⁽⁴⁾ In case of an arrest or attachment being laid on goods belonging to any one residing in another jurisdiction, an application is made to the judge issuing the attachment for *letters requisitorial* to the judge under whose jurisdiction

(1) Bort, van Arresten. 3 D. n. 7.

(2) Bort, *ibid.* n. 3. seqq.

(3) Van Leeuwen, *Cost. van Rhynland.* pag. 197. Roseboom, van Amsterdam. Cap. 19. Art. 3. pag. 73.

(4) Ordonn. op het Proced. te Amsterdam, van 28 Jann. 1779. Cap. 7. Art. 12.

the owner resides, to cite him to appear before the arresting judge. If no attention be paid to these letters, then the party is summoned by edict.⁽¹⁾

Arrests by
inferior
courts.

SECT. IV.

To obtain an arrest or attachment from the court, either against person or goods, we present a petition for a writ of *arrest*, and also a citation in *Rau-Actie*, or on the main question, containing, besides what we have already noticed⁽²⁾ as necessary to a writ in ordinary actions, also a short statement of the grounds on which the party conceives himself entitled to resort to this extraordinary remedy, concluding with the prayer that authority may be granted to the marshal to take such person or goods under arrest, and in *Custodia Regis*, and that the party thus arrested, or person in possession of the goods attached, may be enjoined to permit and suffer the same; and further, with injunction to the party arrested to pay and do what is required of him on the main question by the writ, and in case of opposition, to appear thereto on a certain fixed day.⁽³⁾

Arrest by
the court.

By virtue of this mandament, a day is assigned

(1) Bort, van Arresten, 6 D. n. 11-13. Amsterd. Secret. Cap. 9 et 10.

(2) See p. 401, 402, *supra*.

(3) Jud. Pract. 2 B. 18 Hoofdst. S. 3.

Arrest by
the court.

to the party to appear in court, which day, however, he is at liberty to *anticipate*, by merely serving a notice on the attorney of the plaintiff twenty-four hours before, to file his claim immediately ;⁽¹⁾ but to anticipate or shorten the further terms, an order of the court is necessary.

SECT. V.

Mode of
proceeding
in arrest.

The manner of proceeding in cases of arrest, before the court, in several tribunals, is shortly this. The plaintiff, when the parties appear at the return of the writ, exhibits the order of the court on the petition for arrest, and previously to his making his claim in *Rau-Actie* (*i. e.* on the main question) requests obedience to the writ. To this the party arrested consents, saving all exceptions and defences. Then *condemnation to obey* on these terms is decreed by the court,⁽²⁾ whereupon the plaintiff exhibits his *claim and demand* on the main question, and concludes, 1st. That the arrest shall be declared good, and remain in force and effect, and that the defendant shall be condemned to suffer and permit the same; and further, That on the main question, or in *Rau-Actie*, the defendant be condemned to pay or satisfy the plaintiff's demand, &c.; and lastly, that the goods taken in

(1) Nad. Ampl. Instr. van 24 Maart, 1664. Art. 26.

(2) Manier van Proced. van 1729. Tit. 4. Cap. 3. et Tit. 5. Cap. 3.

arrest shall be declared bound and executable for the judgment with the costs.⁽¹⁾

Mode of
proceeding
in arrest.

When the party arrested conceives that he is by some means privileged from arrest, he may, without entering on the main question, plead *nullity of arrest*, and conclude to the admission of this plea, and that the arrest be removed free of all costs and charges, with compensation thereof, and of all damages and interest; but if his opposition to the arrest is grounded on his defence on the main question, then, in answering to this he concludes “by pleading the general issue, and praying also the discharge of the arrest free from costs, &c., with interdiction to the plaintiff to attempt the like in future, and that he be condemned to make good all costs and damages occasioned, or thereafter to be occasioned thereby, with costs of the proceedings.”⁽²⁾

The party arrested may also, without waiting the decision of the court on the main question, apply to have the arrest provisionally removed under *bail* or *security*. This is always permitted except in the case where we have made the arrest on certain specific goods, as being our own property, to have them restored in specie.⁽³⁾

(1) Judic. Pract. 2 B. 18 Hoofdst. S. 6. page 282.

(2) Judic. Pract. *ibid.* pag. 283.

(3) Bort, van Arresten, 8 D. n. 4. et seqq.

Mode of
proceeding
in arrest.

When the party in whose hands the goods have been arrested does not appear at the return of the writ, *default* is granted against him, the effect of which is *an act of relation*, by which he is held to have tacitly submitted to abide by such decree as shall be made between the arresting party and the other, as to the continuance or removal of the arrest. But if the party who is himself arrested, or whose goods are attached, does not appear, in that case the consequence of the *default* is the continuance of the *arrest* till the decision on the merits of the main question.

With respect to the arrest itself, only one default is necessary, and the three further defaults required are only with reference to the main question. Such is also the benefit of being barred from answering on the question of arrest.⁽¹⁾

It frequently happens that when an arrest is laid upon the person or goods, other creditors of the party appear who are entitled to request that he shall not be set at liberty on the removal of the first arrest, but remain in arrest on their account, which is termed *recommendation in arrest*; i. e. *lodging a detainer*.⁽²⁾

(1) Judic. Pract. 2 B. 18 Hoofdst.

(2) Bort, van Arresten. 2 D. n. 11-16. Van Leeuwen, in not. ad Peck. Cap. 17. n. 1. et Cap. 49. n. 5.

SECT. VI.

Between *Arrests* and *Interdicts* there is a very close resemblance, but no one of his own authority is at liberty to lay an injunction or interdict, at least he who affects to do so of his own authority must content himself with its having no suspensive power during the proceedings; for it cannot begin to operate till the judge by his decree, conformably to the prayer and conclusion of the plaintiff, interdicts or enjoins the defendant. There does not, however, seem to be any reason why the inferior judges may not also on a summary inquiry grant an *injunction*, or restrain the party from proceeding in the prosecution of any act or work during the proceedings. Such injunctions may be granted in all cases; but they are, in the town tribunals, chiefly applied to stay the progress of any new work,⁽¹⁾ and the assent of the chairman of the Board of Magistrates, or of the head *schout* or bailiff of the district, is first applied for.

Interdicts.

SECT. VII.

To obtain an injunction against the commission or completion of a certain act or work, it is now the practice to present a petition to the court for a writ termed a *penal mandament* or *interdict*; that is, an order of the court, whereby

Penal mandament, or injunction and its requisites.

(1) T. t. ff. de nov. oper. nunc.

Penal mandament, or injunction and its requisites.

the party complained of, and all others, if need be, on pain of forfeiting a certain great sum as a fine to the sovereign (which is understood to be the sum of fifty Caroline guilders), are interdicted or restrained from proceeding any further in the act or work complained of, or to cause it to be proceeded in either directly or indirectly ; but on the contrary, they are enjoined to abate, or restore the work or thing, with all its consequences, as wrongfully and unlawfully done, free of all costs and charges, and not to do the like in future, and also to make good to the complainant all costs, damages, and charges already occasioned, or hereafter to be occasioned thereby, with the usual *subpoena* to appear in case of opposition.⁽¹⁾

To obtain an injunction or penal interdict, three things are requisite.

1. A clear right on the part of the complainant : if this right which he conceives himself to have is not well founded, then it is manifest that the other party ought not to be disturbed by an injunction.

If this right be of a doubtful nature, then the question is unfit to be decided in this summary way, on an application for an injunction, before a full investigation of the merits.

If, however, the act or thing against which the injunction is sought, be of that nature that the proceeding in it would cause irreparable

(1) Van Alphen, page 1 D. 26 Hoofdst.

damage to the complainant, whilst on the other hand, the stopping or suspending it for a time would not be attended with equal prejudice to the other party, the injunction in such cases should be granted, and an opportunity afforded to the complainant to establish his right (which in all cases ought to be apparent in his favour) by a regular and more complete judicial investigation.⁽¹⁾

Penal mandament, or injunction and its requisites.

2. A thing actually done by the party to be restrained prejudicial to our right, or a well grounded apprehension on our part that such an act will be done by him, is the second requisite. When, therefore, the party to be restrained can show that his act or work does not violate or affect the right of the complainant, and consequently is no injury to him, or that there is really no reason to apprehend that the act complained of will be repeated, in all these cases no injunction will be granted.⁽²⁾

3. The third requisite is, that without this aid of injunction the party complaining would be remediless in the premises, and have no other legal means of protecting himself; therefore no injunction can be obtained against the publication of the banns of marriage, the usual mode in towns of forbidding the banns being sufficient for this purpose. Nor is it proper to

(1) Jud. Pract. 2 B. 19 Hoofdst. S. 1.

(2) Jud. Pract. d. l.

Penal mandament, or injunction and its requisites.

apply for it to stay execution of any sentence of an inferior or town tribunal.

The ordinary remedy in such case of *opposition in execution* being the proper one.⁽¹⁾

SECT. VIII.

Authorisation de facto.

When the act complained of is of such a nature, that the merely restraining it for the future, or any thing short of abating the act or restoring the thing itself, would be no remedy to the party ; we may in such case, provided our right be incontestable, apply for an *authorization de facto* from the court to the marshal, summarily and without form of process to do the act necessary for our relief, with respect to the thing complained of ; for example, to replace a child *de facto* under the power of the parent ; to eject any one *de facto* from premises which he refuses to quit, when his term is expired ; to release a person *de facto* from prison.⁽²⁾ These applications are generally made to the court, and to prevent the repetition of the act, a prayer for a penalty is added, and there seems no reason why the town tribunals, should not exercise the same jurisdiction.

SECT. IX.

Appointment on petition for an injunction, or penal mandament.

The penal mandaments sought by application to the commissaries of the court, are never

(1) Jud. Pract. d. l.

(2) Jud. Pract. *ibid.* S. 3.

granted in the first instance ; but the parties are ordered to appear to be heard on the merits on a certain fixed day, generally with a clause of suspension in the mean time.

Appoint-
ment on
petition for
an injunc-
tion, or
penal man-
dament.

On the day appointed, the party against whom the mandament is sought, is generally heard in opposition, and a pleading takes place, and afterwards an *appointement or order* is made on the petition, either to grant it by the word *fiat*, or to reject it by the word *nihil*, and if the opposition to the order prayed for by the petition appears to the court perfectly well grounded, then the petition is dismissed with costs, by the word *nihil cum expensis*.⁽¹⁾

Appoint-
ment on
petition.

SECT. X.

When the penal interdict is granted, the mode of proceeding on it agrees in most respects with that on arrest. The defendant may anticipate the day of hearing, by a notice through the marshal to that purpose (*insinuation*). Before making the claim in court, obedience is prayed to the interdict, and professed on the other side, and then the demand is made “ that the order and penal interdict contained in the writ, be confirmed by decree according to its form and tenor, and that it shall, as well and rightly obtained, remain of full force and effect,

How to
proceed in
cases of
injunction.

(1) Jud. Pract. d. l. S. 5.

How to
proceed in
cases of
injunction.

and that consequently the defendant, under a fine of fifty Caroline guilders to the sovereign, be interdicted," &c.

The defendant in answering, concludes in the same manner as in arrest, that the claim and demand be rejected, and the penal interdict removed with compensation of costs, damages, and interest. The benefit of a default is the continuance of the injunction, until the end of the cause on the main question; the further defaults are only relative to the claim in *Rau-Actie*, or on the main question.⁽¹⁾ In opposition to the claim in penal interdicts, no exception or plea of incompetency is admitted;⁽²⁾ nor any counter claim in re-convention.⁽³⁾

(1) Jud. Pract. d. l. S. 8 et 9.

(2) Van Alphen, papeg. l D. pag. 430.

(3) See p. 418, supra.

CHAPTER V.

Of Proceedings in Possessory Cases.

SECT. I.

As we have already observed,⁽¹⁾ that to the Immission.
obtaining, retaining, and recovering possession,
several means are afforded by law, we shall in
this chapter treat of them in this order, as most
convenient.

1. To *obtain* possession. For this purpose a writ of *immission* is applied for, which issues, as almost the only case in which this writ is used, in behalf of a co-heir or joint tenant, who has been ousted or put out of possession, by one or more of the others.

The form of proceeding on this writ, is the same as that on the writ of *maintenue*, with which the writ of *immission* is often joined.⁽²⁾

SECT. II.

2. To *retain* possession, the writ of *maintenue* Maintenue.
is applied for. The court of Holland is the proper court for this purpose.⁽³⁾ In the petition for this writ, the *possession* of the party and the

(1) See p. 185.

(2) Judic. Pract. 2 B. 20 Hoofdst. S. 1.

(3) Instr. Hof. Art. 8 et 39.

Maintenue. *disturbance* thereof by the opposite party, are shortly stated, and upon this a mandament is prayed, in order to be maintained, quieted, and confirmed in the possession to which we conceive ourselves entitled, and that the party may be ordered to free us from all further let, hindrance, or disturbance of our possession, and to pay all costs and damages, with the costs of the application.⁽¹⁾ To this is annexed the citation in case of opposition. The conclusion of the claim is conformable to that of the writ, and there is also joined the prayer for provisional re-possession, termed a *recredentie*. The defendant is at liberty, besides concluding by his answer to the claim that it be rejected, to make also on his part a claim in re-convention, which is termed *redoubling of the interdict*.

The cause is then brought to issue, as in an ordinary suit at law. The pleadings are first upon the question of the provisional re-possession (*recredentie*), and afterwards the principal or main question, i. e. *plenary possession* is brought into a state for decision, by the exchange of inventory and vouchers.⁽²⁾

The defaults are *three* in this case. For the benefit of the first, *recredentie* is decreed; of the *second*, permission to the plaintiff to file his *intendit*, and a third citation, to see it verified;

(1) Van Alphen, Papeg. 1 D. pag. 117.

(2) Judic. Pract. 2 B. 20 Hoofdst. S. 3.

the benefit of the *third* default, is an act to *Maintenue*. annex to the *intendit*.⁽¹⁾

SECT. III.

3. To recover possession.—For this purpose **Complaint.** application is made to the court⁽²⁾ for a mandament or writ of *complaint*.⁽³⁾

The party applying for this writ must show,

1. That he himself had possession, or his predecessors, his family, or lessees, had had it.

2. That the possession was quiet, peaceable, and lawful.

3. That this possession has been of more than a year and a day's continuance.

4. That the complainant has been disturbed within the year.⁽⁴⁾

The writ of complaint consists in a commission to commissaries, after they shall have been satisfied of the possession and disturbance, to summon the parties to appear at the place in dispute (*ter plaatse contentieus*,) and there to maintain the applicant in possession, and to

(1) Van Alphen, Papeg. 1 D. pag. 117. Judic. Pract. d. l. S. 4.

(2) Instr. Hof. Art. 9.

(3) Respecting this remedy, we have an express Treatise of P. Bort, Tract. *Van Complainte*, to be found in his works, pag. 371-461. See also my Judic. Pract. 2 B. 21 H.

(4) Instr. Hof. Art. 39. Instr. H. R. Art. 195. Bort. van Compl. Tit. 5. n. 36. seqq.

Complaint. compel the other party to leave him in quiet possession.⁽¹⁾

In consequence of this, the commissaries repair to the place, and the plaintiff, as he thinks proper, points out the spot, or makes demonstration, as it is termed. His witnesses are then heard and examined by the commissaries, and his proofs given over to them. Upon this the defendant is called upon to produce in writing what he has to say in answer, (*contrarie feiten possessor, destructive, of exceptive,*) for which he also may make demonstration, or prove right of possession, and produce witnesses. The vouchers on each side being given in to the commissaries, they proceed to dispose of the question relating to the *re-etablissement* or provisional replacing of the plaintiff in peaceable possession against the disturbance of the other party, until it shall be regularly decided by the court which of the parties is entitled to this provisional *recredentie*.

This *re-establishment* being adjudged by the commissaries, and obeyed, or the commissaries not having thought proper to order it, there then follows the ordinary citation as in the writ of *maintenue*, and the same mode of proceeding is observed.⁽²⁾

(1) Van Alphen, papeg. 1 D. page 123. seqq.

(2) Judic. Pract. 2 B. 21 Hoofdst. S. 4.

SECT. IV.

4. If the disturbance of possession or eject- Spoliation.
ment be accompanied by force or violence, a
remedy has been introduced into practice bor-
rowed from the canon law, termed a writ of
spoliation (*mandament van spolie**), which is no-
thing else than a possessory common action to
set aside the forcible dispossession, with its
effects, free of costs and charges, and replace
every thing in the state in which it was before
the act of spoliation was committed, with com-
pensation of costs, damages, and interest.

In this case also a *provisional reinstatement* of
the party thus ejected may be prayed. The
form of proceeding is very similar to that in
maintenue, and in this instance there are *three*
defaults.⁽¹⁾

(1) Judic. Pract. 2 B. 22 Hoofdst.

* See page 418, ante-note.

CHAPTER VI.

On Proceedings in Cases of Appeal generally.

SECT. I.

Different
kinds of
appeal.

WHAT causes are of an appealable nature or not we have already noticed.⁽¹⁾ We shall, therefore, in this chapter, merely consider the manner of proceeding to be observed in cases of appeal, and for this purpose shortly treat of the practice in cases of *re-audition*, or *re-hearing*, *appeal*, *reformation*, *reduction*, and *revision*.

SECT. II.

Re-audi-
tion.

First. By *re-audition*, we understand an appeal from a sentence, or any order or appointment made by commissari esat the roll, or one or more members of the court,⁽²⁾ to the full court. It has, in general, the nature and consequences of an appeal; with this difference, however, that it must be prosecuted within *three* days,⁽³⁾ which time is to be strictly observed. We must also, previous to the *re-hearing*, lodge the fine of *ten* guilders.⁽⁴⁾ The cause is then disposed of in a

(1) P. 385-389.

(2) Ordonn. op't Proced. te Amsterdam, van Jann. 1779. Cap. 8. Art. 25-32.

(3) Ordonn. van den Hove van 4 Julij. 1640. G. P. B. 2 D. fol. 1467.

(4) Nad Ampl. Instr. van 24 Maart, 1644. Art. 16.

very summary manner,⁽¹⁾ and on the same vouchers, no others being permitted to be introduced.⁽²⁾ Re-audition.

SECT. III.

Secondly. Appeal is the removing of the sentence of any inferior tribunal to a higher one, with stay of execution (*inhibitie*) in the mean time. Appeal and lapse of terms for prosecution, or *fataha*.

When any one conceives himself aggrieved by the sentence of any inferior court, and seeks to have it reversed, he must begin with noting his appeal (*interjecteren*). This must be done within *ten* days, to be reckoned from the day of pronunciation of the sentence, or rather from the time it has come to the knowledge of the party.⁽³⁾

The appeal thus noted, must within *twenty* days therefrom be prosecuted to the extent that the mandament of appeal must be obtained and served on the opposite party.⁽⁴⁾

These terms for noting and prosecuting the appeal, are not so strictly observed, but that relief may be easily obtained from the effect of any lapse in them.⁽⁵⁾

(1) Judic. Pract. 2 B. 23 Hoofdst. S. 5. pag. 322.

(2) Ordonn. vanden Hove van 28 Februarii, 1584. G. P. B. 2 D. pag. 2160.

(3) Ordonn. op't Proced. in de Steden en ten platten Lande Art. 21. Instr. Hof. Art. 198.

(4) Instr. Hof. Art. 204 et 206.

(5) Groenewegen, de Leg. abrog. ad L. 3. C. de temp. et repar. appel.

SECT. IV.

Anticipa-
tion and
non-prose-
cution of
appeal,
(*Desertia*).

But in order that the party in whose favour a sentence has been passed, may not be exposed to be tied up in a state of uncertainty whether the other party by means of relief against the lapse of time will still prosecute his appeal, two remedies have been introduced in practice, namely, the *mandament of anticipation*, and the *mandament of desertion*.

When the case is of an urgent nature, and does not admit of delay, for example, in matrimonial affairs, arrests, and the like, a petition is presented to the court, praying that the appellant may be ordered by a certain fixed day to bring in his case, and that in default thereof the appeal be declared *desert*. This is termed a mandament of *anticipation*, the consequence of which is, that the appellant must (without being allowed to be heard in opposition) immediately during the roll, or, at least, within eight days after, make his claim in appeal, or he is at once barred therefrom. If the appellant, when cited upon this writ or mandament does not appear, then, for the benefit of the default, the appeal is immediately declared *desert*.⁽¹⁾

In case the party who has entered the appeal neglects to prosecute the same, and the cause is not of a nature particularly urgent or pressing, the respondent, in such case, in order to prevent

(1) Judic. Pract. 2 B. 27 Hoofdst.

his being tied up for ever, may, after the expiration of the term allowed for prosecution of the appeal, either take out execution on the sentence of the court below, which will have the effect of bringing the party forward, or apply to the court of appeal for a *mandament of desertion*, by virtue of which he obtains a judicial declaration that the time limited for prosecuting the appeal has expired.⁽¹⁾

Anticipation and non-prosecution of appeal, (*Desertie*).

SECT. V.

The first step in prosecuting an appeal, after noting it, is to present a petition to the court of appeal, setting forth

Form of Proceeding in appeal.

1. The original cause of action.
2. A statement of the proceedings therein.
3. The sentence complained of,⁽²⁾ upon which a mandament of appeal is prayed for. This writ contains

1. An authorization upon the marshal to cite the respondent to see the sentence annulled or reversed, or to defend it, or renounce the benefit thereof, as he shall think fit.

2. Also to intimate to the judge who has given the judgment, to maintain the justice of the same, if he thinks proper to do so; and—

3. The clause of *inhibition*, that is, a clause commanding all parties pending the appeal, and

(1) Judic. Pract. 2 B. 28 Hoofdst.

(2) Judic. Pract. 2 B. 24 Hoofdst. S. 24.

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Form of
proceeding
in appeal.

in obedience thereto, to leave the cause in its original state; and should any steps have been already taken after sentence, to replace things in their original state.⁽¹⁾

These are the usual clauses in the mandament of appeal. Sometimes, however, they contain special clauses,⁽²⁾ as, the *clause of relief* against the lapse of the time allowed by law for entering or prosecuting the appeal:—the *compulsory clause*, or order upon the secretary of the court below, to give out a copy of the sentence, and also copies of the papers in the cause:—the *clause* for demanding, at the day of hearing, that the sentence appealed from be immediately *casated* or annulled,—this is done when the judge, in framing and forming the sentence, has so grossly erred, that it is void at law:⁽³⁾—the *clause* permitting the appellant at the day of hearing to demand reparation for acts done in execution of the sentence in disobedience to the appeal *reparatie van attentaten*, and that these acts be set aside.

No one is admitted to a hearing by the court of Holland on an appeal unless, at the time of taking out the mandament, he deposits in the hands of the proper officer the sum of forty guil-

(1) Van Alphen, Papeg. 1 D. pag. 296.

(2) Judic. Pract. 2 B. 24 Hoofdst. S. 24.

(3) T. t. ff. quæ sent. sine appell. rescind. ibique. D. D. in Comment. S. Vantius in Tract. de null. Process. ac Sentent.

ders, which is given back to the appellant in case the sentence is altered or reversed; but if it is confirmed, then the deposit is declared forfeited to the use of the government.⁽¹⁾

Form of
proceeding
in appeal.

On the day of hearing the appellant opens his case, and concludes by praying that the sentence be annulled, and that the court of appeal doing that which the court below, or of first instance ought to have done, shall now reject or admit the original claim with the costs of both instances.⁽²⁾ The respondent, in case he is of opinion that the cause is not of an appealable nature, without entering upon the merits proposes the exception of *not admissible in appeal*, upon which a preliminary pleading and decision takes place. But if the cause is not subject to this exception, then the respondent opens his case, stating the original cause and proceedings as he thinks best, and upon the grounds stated, concludes that the appellant may be declared not to be aggrieved by the sentence in question, and that he be condemned in the costs.⁽³⁾ Sometimes the sentence may happen to be in part prejudicial and in part beneficial to the appellant, and in the latter respect prejudicial to the respondent, who may

(1) Nad. Ampl. Instr. van 24 Maart, 1644. Art. 9. 10. 13. et 14.

(2) Judic. Pract. 2 B. 24 Hoofdst. S. 26.

(3) Judic. Pract. *ibid.* S. 27.

Form of
proceeding
in appeal.

thereby conceive himself aggrieved, in which case he is at liberty, without entering a separate appeal, to state in what he conceives himself aggrieved by a sort of *Re-convention*.

This is termed, in practice, *to propose grievances à minima* (*grieven à minima proponeeren*), or to *make demand à minima* (*eisch à minima doen*), after which the case is, upon a *persistit*, as it is termed, brought to issue by replication, &c.⁽¹⁾

In case the respondent does not appear, the appellant is entitled to *three* defaults. The benefit of the *first* is another mandament; of the *second*, the reversal of the sentence and permission to the appellant to file his *intendit* on the main question, and a third mandament to see it verified. The benefit of the *third* default is an act to annex to the *intendit*.⁽²⁾

SECT. VI.

Reformation.

Thirdly. Another species of appeal is termed *reformation*, which is used when the sentence whereby we conceive ourselves aggrieved is of such a nature, either from the insignificance of the sum, or some other cause, as not to admit of appeal,⁽³⁾ or when by virtue of the sentence no execution follows, as for instance, when the plaintiff's demand is rejected with condemna-

(1) Judic. Pract. d. l.

(2) Judic. Pract. ibid. S. 28.

(3) See p. 387, *supra*.

tion of each party to pay his own costs. The mode of proceeding in this case is the same as that in appeal. The difference between these two legal remedies consists principally in this, Reformation.

1. *Appeal* has of itself a suspensive power, so that the sentence cannot in the meantime be executed.

Reformation on the contrary, does not prevent the sentence from being executed under security.⁽¹⁾

2. The time within which to prosecute an *appeal*, after entering it, is *twenty* days; a *Mandament of Reformation* may be taken out at any time within the year.⁽²⁾

3. The fine for an *appeal* is *forty* guilders; for *reformation* only *twenty*.⁽³⁾

SECT. VII.

Fourthly. When the decision of which we complain is not the sentence of the ordinary judge, but the award of *arbitrators*, the appeal in this case is termed *Reduction* (*Reductie*). Reduction, or proceeding to set aside an award.

This reduction or application to the court to set aside the award, may be made in all cases, except when the *compromise*, or act of submission to the award is entered⁽⁴⁾ into, under a clause

(1) Instr. Hof. Art. 12.

(2) Instr. Hof. d. Art.

(3) Nad. Ampl. Instr. van 24 Maart 1664. Art. 9 et 10.

(4) Nad. Ampl. Instr. Art. 20.

Reduction,
or proceeding to set
aside an
award.

of willing condemnation, and that this condemnation has actually been granted, and made a rule of court.

The noting of a reduction is done by a notarial act, and served upon the opposite party.⁽¹⁾ Although it is by no means settled whether in reduction we cannot apply to the ordinary judge,⁽²⁾ yet, it is the common practice to apply to the court for a *Mandament of Reduction*.

The mode of proceeding in this case is precisely the same as in that of *Appeal* and *Reformation*.

SECT. VIII.

Revision,
or new
trial.

Fifthly. The last species of *Appeal* is that of *Revision*, whereby we understand an application by any one who feels himself aggrieved by the sentence of the superior or chief judge, to have a new trial before the same court, with the addition of a certain number of persons as assessors (*Adjuncten Reviseurs*), who are named by the sovereign specially for this purpose.⁽³⁾

No revision is permitted of interlocutory orders or decrees, or of sentences for provisional payment (*Namptissement*), which, by the final decision on the main question, may be

(1) Judic. Pract. 2 B. 26 Hoofdst. S. 1.

(2) Voet, ad tit. ff. de recept. n. 27.

(5) Judic. Pract. 2 B. 29 Hoofdst. S. 1.

rectified ; nor of willing condemnation ; nor of sentences in possessory cases.

Revision,
or new
trial. .

In civil cases *revision* is never granted *Pro Deo*, (*i. e.* to a person who sues in *forma pauperis*); nor even in criminal cases, unless the party is condemned to corporal punishment, and had a fourth of the members of the court in his favour.⁽¹⁾ *Revision* must be noted within six weeks, and a deposit as a fine of *two hundred* guilders be made.⁽²⁾

The mandament of revision must be taken out and served in time, that it may be returned within a year, if the party applying for it reside in *Europe*, or if he reside in other parts of the world,⁽³⁾ within two years after pronunciation of the sentence.

When revision is noted of a sentence, the execution of which would be irremediable by the final decision of the cause, the party may pray an order of the court to prosecute the revision within a short time.⁽⁴⁾ The pleadings in revision are short, and confined to the proceedings in the former instance or trial.⁽⁵⁾ The number of revisors or assessors added to the court, are,

(1) Reglement op de Revisiën van Sententiën van den Hove van Holland en Zeeland. van 1 Feb. 1796. Art. 2.

(2) Regl. Art. 3.

(3) Regl. Art. 4.

(4) Regl. Art. 5.

(5) Regl. Art. 6.

Revision,
or new
trial.

in civil cases, *six*, and, in criminal cases, *eight*. They are nominated by the government of the district or department, within one month after issue is joined.⁽¹⁾ Within two months after the nomination, the plaintiff in revision prays, if it be a case to be pleaded *viva voce*, a day to plead; and if it be a case in which the arguments are to be stated in writing, a memorial or *Deduction* is filed by both parties within this time.⁽²⁾

The cause in revision is decided upon the vouchers in the original cause, and after decision, no further proceedings are allowed.⁽³⁾

(1) Regl. Art. 7, 8, et 9.

(2) Regl. Art. 10.

(3) Resol. Holl. 25 Jann. 1659. G. P. B. 7 D. fol. 938.
Regl. Art. 12 et 14.

CHAPTER VII.

*Of the Benefit of Inventory, Cession, Attermi-
nation, Induction, and Relief.*

SECT. I.

BESIDES the remedies afforded by law, in the cases above-mentioned, there are also some which, although they issue from the Court of Holland in the first instance, yet are left to the judge of the domicile of the party, to be confirmed or not (*Geinterneed*), after a previous hearing of the parties thereon, and a judicial investigation.

Benefit of
inventory.

This charge on the part of the court to the judge of the domicile, to confirm the writ or not after due investigation, is termed a *Committimus*, and we shall dedicate this chapter to an explanation of the several modes of proceeding in these cases.

1. *Benefit of Inventory.*⁽¹⁾ To obtain this writ a petition is presented to the Court of Holland, stating the apprehension of the heir that the estate on which he is entitled to enter by way of inheritance, is encumbered with debts, and that, consequently, by accepting or entering upon it,

(1) See what we have before observed on this head, p. 151 et seqq.

Benefit of
Inventory.

he may be exposed to great loss and damage. He, therefore, prays the writ of *Benefit of Inventory, with Committimus* to the judge of the town where the deceased died, or if he died in the country, then to the nearest town tribunal.⁽¹⁾ By virtue of this writ the marshal summons the creditors of the estate and the legatees,

1. To be present at a certain day at the house of the deceased, there to witness the making an inventory of the property, and

2. To appear before the judge to whom the *committimus* is addressed, to see the writ confirmed. The inventory is made by the marshal, under the superintendence of two members of the court, and must be done within *forty* days after the issuing of the writ.⁽²⁾

As soon as the goods are inventorized, the heir must cause them to be appraised, and give security for the amount. He must further bring the estate to liquidation, and render an account. On the day fixed for the appearance of the parties interested in court, the heir prays the *interination* or confirmation of the Writ of Benefit of Inventory, according to its form and tenor. The creditors who wish to oppose, conclude by their answer to the rejection of the same, with costs. In this proceeding there is

(1) Ampl. Instr. van't Hof. Art. 5. Van Alphen, pageg. 1 D. pag. 214 et 221.

(2) Placaat van Keizer Karel van 19 Meij 1544. Art. 39.

only *one* default, the benefit of which is the confirmation of the writ.⁽¹⁾

Benefit of
inventory.

SECT. II.

2. *Benefit of Cession, or the Cessio Bonorum.*

Benefit of
the *cessio*
bonorum.

To obtain this writ a petition is presented to the Court of Holland, as in this respect succeeding to the late high Court,⁽²⁾ in which are inserted the names and places of abode of the principal creditors.⁽³⁾

This petition, accompanied with a letter missive, is sent by the court to the government of the department of the petitioner's domicile, for their report thereon.⁽⁴⁾

This, however, is not required when the petitioner lives in the country.⁽⁵⁾ The report having come in, and no special objections appearing, the *writ of cession* is granted by the court, with *committimus* to the judge of the petitioner's present place of residence, or of the place where he dwelt last within the year.⁽⁶⁾

The effect of the writ of cession, when granted and served, is to free the person of the peti-

(1) Judic. Pract. 2 B. 30 Hoofdst. S. 4.

(2) Reglem. 18 Sept. 1595. Art. 2.

(3) Ordonn. H. R. 24 Junii. 1649. G. P. B. 7 D. pag. 936.

(4) Resol. 2 Meij. 1595.

(5) Judic. Pract. 2 B. 31 Hoofdst. S. 2. pag. 396.

(6) Resol. Holl. 14 Sept. 1736. G. P. B. 6 D. pag. 652.

Benefit of
the *cessio*
bonorum.

tioner from arrest;⁽¹⁾ but a curator is immediately appointed over his property. On the day fixed for the return of the writ into court, the party must appear in person, and file a statement and inventory of his effects, and pray the confirmation of the writ.⁽²⁾ The creditors who are cited have the right, previously to their answering, to demand a copy of the writ and of the inventory, a statement of the misfortunes of the petitioner, and inspection of all the papers relating to his affairs.⁽³⁾ If they conceive there are sufficient grounds to oppose the claim, on the head of fraudulent conduct, they conclude by their answer to the rejection of his prayer for confirmation of the writ, and at the same time request that the petitioner shall provisionally be ordered into close confinement. On this follows a pleading, and then the decision of the court.

In this proceeding there is but *one* default, the benefit of which is the *Interination* of the Writ.

SECT. III.

Attermina-
tion, or
Writ of
Protec-
tion.

Attermination, or *Respite*.—This benefit consists in granting, by writ, or letter of licence,

(1) See my *Verzam. van merkwaardige Gewijsden*. 1 D. Cas. 30. p. g. 322.

(2) *Judic. Pract.* 2 B. 31 Hoofdst. S. 5.

(3) *Judic. Pract.* d. 1. pag. 400.

a delay of payment, for five, or a less number of years, provided good security be given for the payment after that time.⁽¹⁾ For this purpose a petition is presented to the Court of Holland, instead of the late Supreme Court,⁽²⁾ setting forth that the state of the petitioner's affairs is such, that although he actually has the means of paying, yet an indulgence of time is necessary for this purpose, and that he further is prepared to give proper security to the creditors for the payment of their several demands; upon which grounds he prays the *Writ or Letters of Attermination*, with *Committimus* to the judge of his domicile.⁽³⁾

Attermi-
nation, or
Writ of
Protec-
tion.

These letters being granted and served on the creditors, the petitioner, on the day of their return into court, prays that they may be confirmed, and at the same time files the security bond: when the creditors are at liberty to oppose the confirmation, either on the ground of the insufficiency of the security offered, or of fraudulent conduct in the party, which renders him unworthy of this indulgence. On this follow a pleading, and the decision of the court thereon.⁽⁴⁾

(1) Voet, ad tit. ff. de cess. bon. n. 14. seqq.

(2) Reglem. van 18 Sept. 1795. Art. 3.

(3) Judic. Pract. 2 B. 32 Hoofdst. S. 2.

(4) Judic. Pract. ibid. S. 3.

SECT. IV.

Induction,
or grant of
time.

4. *Induction*.—This is an order of the court,⁽¹⁾ made on a petition presented for this purpose, whereby the marshal is empowered to summon the creditors of the party to appear before the judge of his domicile, to show cause why an indulgence in the time of payment should not be granted to him, with charge to the judge to make such final order thereon as shall be just and meet. This order being served on the respective creditors, is filed by the party at the roll, and under tender of such security as he may be able to offer, he prays that the judge may be pleased to hear such creditors as may appear by themselves or attorney, and if possible to induce them to grant the indulgence prayed, or in case that they refuse to hear reason, that he will decide *ex officio* according to reason and justice.

The creditors are heard upon this, and if they oppose, a pleading follows, and the judge then decides.⁽²⁾

SECT. V.

Relief, or
Restitutio
in *Inte-*
grum.

5. *Relief, or relieving a party from any act or contract, and replacing him in his former situation, (restitutio in integrum,)* is granted on the ground

(1) Ampl. Instr. Art. 7.

(2) Judic. Pract. 2 B. 33 Hoofdst. S. 3 et 4.

of his having been induced through fear, fraud, minority, error, or other sufficient reasons, to do the act against which he prays relief.⁽¹⁾

Relief, or
Restitutio
in Inte-
grum.

The granting of this remedy originally appertained to the high or supreme court; but, since its abolition, it has devolved on the Court of Holland.⁽²⁾

The different species of relief, which are granted by way of provision of justice by the court in the first instance, but which are always referred to the judge to whose jurisdiction the matter belongs, or before whom it is pending, to be confirmed,⁽³⁾ are of two kinds; they relate either to the original matter itself (*substantial relief*), or merely to some omission or error in the process or pleadings—(*judicial relief*).

They are granted either by way of mandament if the cause has not yet been commenced, or by way of order on a petition in the cause if the action has been already brought (*brieven van requeste civiel*). To illustrate this by an example, let us suppose that A. conceives that he has been deceived by B. in a certain contract or dealing, and therefore entitled to recover back what B. has received from him on this account. In this case he applies to the court for a man-

(1) See p. 275; *supra*.

(2) *Judic. Pract.* 4 B. 1 Hoofdst. S. 1. *Reglem. van 18 Sept. 1795. Art. 3.*

(3) *Verdrag. van 3 Aug. 1587. Art. II.*

Relief, or
Restitutio
in Inte-
grum.

dament, or writ of *raue-actie*, to recover back this money, with a *clause of relief* against such acts on his part as might, in strictness of law, be a *bar* to his proceeding ; with *committimus* to the ordinary judge of B., after proper investigation to confirm the clause of relief. But suppose, on the other hand, that B. has already brought an action against A. to enforce this fraudulent contract, and that A. wishes to be relieved from it, then, in such case, A. must not apply for a mandament or writ to found his action for relief thereon, because there is already a suit pending, but only pray for an order on a petition presented by him in the cause to this effect, with *committimus* to the judge before whom the cause is pending.^{(1)*}

The reliefs against errors or omissions in pleadings or proceedings, and the like, are of various kinds. Besides the *relief* against the not entering or prosecuting an appeal within the time limited by law, and for which a special clause is introduced in the mandament of appeal,⁽²⁾ there are reliefs,

1. Against defaults.

(1) Judic. Pract. *ibid.* S. 4.

(2) See pag. 454, *supra*.

* This section will, it is conceived, enable the English reader clearly to comprehend the mode of proceeding in the courts on the Continent, which follow the civil law, in cases wherein strict law and equity would be at variance with each other.—T.

2. Against being barred from answering.
3. To be permitted to alter the claim and demand.
4. To extend it.
5. To produce evidence after the time is passed.
6. To amplify and augment the same after publication is passed ; and
7. To introduce and prove new facts in the cause.⁽¹⁾

Relief, or
Restitutio
in *Inte-*
grum.

Both the *mandament of relief*, as well as the *requeste civil* (or petition in the cause), being submitted to the investigation of the judge to whom the *committimus* is addressed, the claim must be made before him for the *interination* or confirmation of the relief according to its form and tenor, and consequently that the party may be relieved and replaced, *in integrum*, or in his former state according to the tenor of the writ.⁽²⁾

If the other party wishes to oppose the relief, he answers by concluding to the rejection of the same, and that the *interination* may be refused.

(1) Judic. Pract. *ibid.* S. 8.

(2) Judic. Pract. *ibid.* S. 9 et 10.

CHAPTER VIII.

Of the Manner in which Causes, after Issue joined, are brought to Hearing.

SECT. I.

Pleadings
in causes
upon the
Roll.

THERE is a certain class of causes which, after issue joined, require nothing further than a verbal pleading.

This is the case in all questions upon provisional or interlocutory decrees, exceptions, and incidents, also in those causes which are decided in a summary manner.⁽¹⁾

In the town tribunals this pleading takes place before the full court; in some places before a less number of the members;⁽²⁾ and in the court of Holland before commissaries at the roll.⁽³⁾

SECT. II.

Verbal, or
written
pleadings.

All other causes, after the exchange of inventory and vouchers, are pleaded either orally or by written arguments or memorials (*deductie*).

In the town tribunals the pleadings are almost

(1) See 3. cap. 7. 421 et seqq. supra.

(2) Ordonn. op't Proced. te Amsterdam van 28 Jann. 1779. Cap. 6. S. 11. en volgg. Keuren van Leyden No. 183. pag. 269.

(3) Judic. Pract. 2 B. 5 Hoofdst. S. 4. en 3 B. 1 Hoofdst. S. 1 et 2.

always oral, and there are few written arguments, except in cases which, from their nature, do not admit of being pleaded *viva voce*. In the Court of Holland the following rules are observed, with respect to both kinds of pleadings:

Verbal, or
written
pleadings.

1. All questions on mere points of law, and in which no proof or evidence is necessary, in cases to the amount of one thousand guilders and upwards, are pleaded orally before the court.⁽¹⁾

2. All questions of fact, in which the testimony of witnesses is necessary, in cases of one thousand guilders and upwards, must be pleaded in writing.⁽²⁾

3. All causes below one thousand guilders are always pleaded before two commissaries.⁽³⁾

4. All ordinary criminal cases are conducted as written causes, though they are nevertheless afterwards pleaded verbally before the court.⁽⁴⁾

Immediately after the cause is brought to issue, the court, by a note or minute on the roll, decides between the parties whether the cause shall be pleaded verbally or in writing; this is termed an appointment dispositive (*Appointement Dispositief*).⁽⁵⁾

(1) Nad. Ampl. Instr. van 24 Maart 1644. Art. 27.

(2) D. Art. 27. Merula, Man. van Proced. Lib. 4. tit. 42, Cap. 4. in not.

(3) Reglem 9 Maart 1728. Art. 7.

(4) D. Reglem Art. 1.

(5) Judic. Pract. 33. 1 Hoofdst. S. 6.

SECT. III.

Exchange
of inven-
tory and
vouchers.

Previously to the pleading, either verbally or in writing, *the exchange of inventory and vouchers* must take place. To compel each other thereto, three appointments or orders are necessary in the Court of Holland.⁽¹⁾ In the town tribunals, the practice generally is, that the party who has filed his inventory, requests that the opposite party shall be barred from producing further vouchers.

The *Inventory*, or list of papers in the cause, has not every where the same form;⁽²⁾ but we must certainly acknowledge that they are no where more neatly drawn up than in the court.

After filing the inventory and power passed to the solicitor in the cause, another paper, marked with the letter following them in the order of the alphabet, is put in, containing the pleas of the first or second instance, each separately with a short statement of the proceedings.

After this follow the vouchers in proof of the

(1) Merula, Man van Proced. Lib. 4. tit. 42. Cap. 4. in not.

(2) It would be as well if a little more attention were bestowed by practitioners, on this part of the proceedings. The memorandums or lists of vouchers at Amsterdam in particular, are sometimes given in a very slovenly form. And yet a neatly and well-framed inventory of vouchers is a great assistance to the judge, in enabling him to form a clear idea of the cause.

facts at issue, in the same order as they are placed in the mandament, or in the conclusion of the answer, with reference to the article to which each relates as proof.⁽¹⁾ In causes to be pleaded verbally it is also the practice to add at the end of the inventory a paper termed *casus positio* (*casus positie*), containing a statement of the whole case and of the pleadings, and, lastly, the point or question arising therefrom to be decided by the Court.⁽²⁾

Exchange
of inven-
tory and
vouchers.

SECT. IV.

If certificates or declarations of individuals, as to the facts in the case, are filed with the inventory, then, in causes before the town tribunals, follows the *hearing of witnesses*, since, according to law, no witness can be attended to who is not sworn, and an opportunity afforded to the opposite party to cross-examine him. This in practice is termed *examining witnesses in forma probanti*.⁽³⁾

Hearing of
witnesses
before the
ordinary
tribunals.

The witnesses must appear personally before the judge to confirm their declaration or certificate by oath, and at the same time answer upon *counter* interrogatories, which are put to them by the judge in the name of the opposite party. With respect to the framing of these counter in-

(1) Judic. Pract. 3 B. 2 Hoofdst. S. 7-9.

(2) Judic. Pract. *ibid.* S. 5.

(3) Voet, ad tit. ff. de testib. n. 15.

Hearing of
witnesses
before the
ordinary
tribunals.

terrogatories, we must be particularly careful to confine them to the matter contained in the certificate or declaration, without questioning the witness to matters *de hors*, and which have no relation thereto, and we must also carefully avoid all unnecessary, impertinent, and especially entrapping or leading questions, which if they *strike* the judge as such, he is bound to expunge.⁽¹⁾ All this, with the further vouchers which it may be thought necessary to introduce, is made up by a second additional inventory (*ampliatie inventaris*) annexed to the proceedings, when the further production of evidence is closed, or publication passed. The proceedings are then made up, which is termed *renouncing further production* (*renuncieeren van verdere productie*), and a day for pleading is prayed.⁽²⁾

In the Court of Holland no witnesses are heard in verbal pleadings at the bar. This is done only in the case of written pleadings, the form of which we shall shortly state hereafter.

SECT. V.

Pleadings
before the
court, and
rules to be
observed
therein.

The proceedings being closed, the case is then argued or pleaded in court. By *pleading* we understand the stating verbally before the

(1) Judic. Pract. 3 B. 4 Hoofdst. S. 12.

(2) Ordonn. op't Proced. in de Steden en ten platten Lande. Art. 14-28. en aldaar S. Van Leeuwen, in not.

court the facts and reasons of our case, and answering the objections on the other side. In the same manner as in the formal and previous proceedings at the roll, the pleadings in court have also four terms, *Claim, Answer, Replication, and Rejoinder, (Replique et Duplique)*.

Pleadings before the court, and rules, to be observed therein.

The power of arguing a cause with talent is the work of time and practice. The following rules, however, deserve to be particularly noticed.⁽¹⁾

1. The advocate must thoroughly view and examine the case on all sides, and be perfectly master of it; repeatedly read the papers; bring out the true point of law in the case, and consider the sound application of the fundamental principles of law to this point. Further, he

(1) On this head the little work of GUI, *De l'Eloquence du Barreau*, (Paris 1767. in 8vo.) deserves to be particularly noticed. To the framing of a good argument, certainly the reading of the Orations of Cicero and Demosthenes is useful. But such is the difference between their mode of pleading causes and ours, that we should not content ourselves with reading them, but consult also the works of D'Aguesseau, (Paris, 1759, 8 vols. in 4to.*) and of Cochin, (Paris, 1771. in 6 vols. in 4to.); and, above all, what we chiefly recommend from experience for the forming of the style in pleading, the reading of the printed legal arguments and memorials.

* A new edition was published at Paris in 16 vols. in 8vo. in the year 1821, with notes, by Monsieur Par Dessus, Professor of Law.—T.

Pleadings
before the
court, and
rules to be
observed
therein.

must examine what the best writers on this head have said, and the decision of judges on similar cases. These are the means by which a good pleader is formed.⁽¹⁾

2. All this is contained in the draft of our speech or argument. The first essays ought to be full and entire; but we should accustom ourselves by degrees to abbreviate it, so that at last we may be able to argue the case from a few notes.

The style ought to be clear, conciliatory, and grave,⁽²⁾ and the pleader should never lose sight of his grand object, which is to convince the court that he has reason on his side.⁽³⁾

3. The best order and division is that which is most calculated to bring the question in a clear and acceptable manner before the court. Very frequently the order of the proceedings, or course of the cause, suggests the best division.⁽⁴⁾

4. A great object with the advocate should be to avoid *tediousness*: it deadens the attention, tires the court, and finally we lose our object. We must be careful, however, not to fall into the opposite extreme, and, by leaving

(1) Judic. Pract. 3 B. 2 Hoofdst. S. 13.

(2) Judic. Pract. *ibid.* S. 14.

(3) Judic. Pract. *ibid.* S. 18.

(4) Judic. Pract. *ibid.* S. 15.

out what is essential, become *superficial*. A middle course between these two extremes is the safest.⁽¹⁾

Pleadings before the court, and rules to be observed therein.

5. The arguments also should be enforced with a natural and unaffected eloquence, accompanied with a proper degree of modesty towards the court, and decorum towards the opposite party. The using of offensive language dishonours the bar, and even this requisite, modesty and decency, does not preclude a proper confidence, nor prevent the advocate, when necessary, from calling things by their proper names.⁽²⁾

SECT. VI.

In the town or ordinary tribunals there is hardly any difference observed between causes pleaded orally, and in writing. But in the Court of Holland, the causes in writing have entirely a special form, of which it will here be sufficient to give the following short sketch.⁽³⁾

Causes pleaded by memorials in writing.

1. They commence with entering a minute on the roll, that the cause will be pleaded by a written memorial.

This is termed appointment of disposition, or a rule to make an act to produce vouchers, if necessary, and the witnesses. The inventory is

(1) Judic. Pract. *ibid.* S. 16.

(2) Judic. Pract. *ibid.* S. 17.

(3) Judic. Pract. 3 B. 3 et 4 Hoofdst.

Causes
pleaded by
memorials
in writing.

then brought in, with all the vouchers, in due order, and filed at the *furneer* or production roll of the court. After this we wait a term of four weeks, when, if the opposite party does not in like manner file his vouchers within that time, a notice is served on him (*insinuatie*), and next an order of court for this purpose.⁽¹⁾

The vouchers being produced on both sides, an exchange takes place of inventory and vouchers, and then each party delivers to the court a secret writing or memorial, technically termed *advertissement van rechten*, or the legal argument, which, properly speaking, is nothing more than a written pleading, expressed in fluent language, with a series of arguments following in close order and connection, on each point of the case.

The rules to be observed by the pleader in open court, are also applicable in this case.

Thus far, when no witnesses are to be examined; but if this is the case, and either of the parties does not think proper to declare that he will consider the witnesses as examined, they must appear before commissaries, for the purpose of being examined, of all which a roll is kept. The first step is to request at the furnishing or production roll, term for the production of evidence.⁽²⁾ Then two petitions are presented, the one for

(1) Judic. Pract. *ibid*, 3 Hoofdst, S. 4.

(2) Judic. Pract. *ibid*. 4 Hoofdst. S. 9.

subpœna, for the witnesses to appear and be heard, and the other for *commission* to the commissaries to examine them.⁽¹⁾ Notice then of the day fixed for examining the witnesses, is served by the attorney of one party, on the other, together with copies of the certificates or declarations of the witnesses.⁽²⁾ At the day appointed, the witnesses are examined before commissaries, as well on their own declaration, as on counter interrogatories, framed by the opposite party, in case he thinks fit. This examination is kept secret from both parties till they have renounced all further production, and taken out a rule to pass publication.⁽³⁾ The cause is then, with the accustomed minutes, entered at length on the furnishing or production roll for decision.⁽⁴⁾

Causes
pleaded by
memorials
in writing.

(1) Judic. Pract. *ibid.* S. 10.

(2) Judic. Pract. *ibid.* S. 11.

(3) Judic. Pract. *ibid.* S. 14.

(4) Judic. Pract. *ibid.* S. 15.

CHAPTER IX.

Of Sentences and their Execution.

SECT. I.

THE cause having been brought by both sides, into a state for the decision of the court, sentence must then be given thereon. In the Court of Holland, the papers on both sides are placed by the president in the hands of one of the members, for his examination and report thereon ; who is named the *reporter* in the cause.

Reporting
judge in
the cause.

He must not be related to any of the attorneys, or counsel in the cause.⁽¹⁾

His duty is to observe the strictest secrecy in examining the papers, and to make short notes of the same, which is termed a *recueil*.⁽²⁾

The reporter having given in his report, the papers are then read in court, and sentence given according to the plurality of votes, under which sentence are inserted the names of all the members present who have voted.⁽³⁾

In the town tribunals the papers are not referred for report, but are sent round to each member, in order, for two, three, or more days,

(1) Resol. Holl. 23 Maart 1669. G. P. B. 3 D. pag. 663.

(2) Instr. Hof. Art. 149 et 150.

(3) Instr. Hof. Art. 34. Decis en Resol. van't Hof. No. 121.

to be read by them; after this each gives his vote, and the majority decides, which sentence must be signed by all the members.

Reporting
judge in
the cause.

SECT. II.

It happens sometimes, that the judge, in the course of the investigation, finds that one or more points which are under consideration in framing the sentence, have either been left without proof, or not sufficiently proved. In this case the judge requires the party whom it concerns to adduce such proof, within a certain time; this is termed *opening points of office*.⁽¹⁾

Calling for
further
evidence.

SECT. III.

With respect to *definitive sentences*, we must observe:

1. That they must contain an entire or partial admission or rejection of the plaintiff's demand, without using the general expression, *The demand of the plaintiff in manner as filed is rejected*.⁽²⁾

Requisites
of a defini-
tive sen-
tence or
judgment

2. That justice must be administered therein, in the name of the *Batavian people*; ⁽³⁾ which clause is introduced in place of the one,* for-

(1) Judic. Pract. 3 B. 5 Hoofdst. S. 4.

(2) Ordonn. op't Proced. in de Steden en ten platten Lande. Art. 19. Ampl. Instr. van't Hof. Art. 26.

(3) Staatsreg, van 1805. Art. 73.

* After the establishment of the Batavian Republic.

Requisites
of a defini-
tive sen-
tence or
judgment.

merly made use of, *in the name, and on the part of, the sovereignty of Holland, Zeeland, and West Friesland.*⁽¹⁾

3. That the sentence also determines the question of costs, either by condemning one of the parties therein, or by making each pay his own. The latter is usual in cases in which the parties are nearly related ; and in appeal cases either because the respondent has already had a decree in his favour, in the court below, or that the case has appeared so doubtful to the judge, that in his view of it, neither the plaintiff's action, nor the defendant's resistance thereto, appear to have been without grounds: all which is left to the conscience of the judge.⁽²⁾

4. That a sufficient number of members be present.

In the town tribunals, the sentence is passed by all the members, in so far as they are not prevented, by sickness or otherwise, from attending. In the court of Holland, five members are necessary to constitute a court in civil causes ; and in criminal causes, the court ought to be as full as possible.⁽³⁾

(1) Judic. Pract. 3 B. 5 Hoofdst. S. 6.

(2) Instr. H. R. Art. 49. Voet, ad tit. ff. de re judic. n. 22.

(3) Judic. Pract. 3 B. 5 Hoofdst. S. 7.

SECT. IV.

To render a sentence valid it must be *pronounced* publicly. This is done at the roll by the registrar or secretary. In the inferior tribunals, it is not usual to charge the parties with any fees for the attendance of the members, &c.; but in the country tribunals, the fees paid by the court to advocates or counsel unconnected with the cause, for their opinion on matters of law, before the court decides, are charged to the parties.

Pronun-
ciation of
sentence.

In the Court of Holland the parties are charged with the fees of the reporting judge, which may be recovered by summary execution, and for the payment of which no copy of the sentence is given off.⁽¹⁾

A judge, when the sentence is once pronounced, cannot alter it, but is at liberty to explain his meaning by way of *interpretation*.⁽²⁾

SECT. V.

So soon as a sentence has become a judgment, either by its not being appealable, or by no appeal being lodged against it within the ten days limited by law, or by the expiration of the time allowed for prosecuting the appeal, it

Execution,
Writ of.

(1) Resol. van't Hof. van 11 Feb. 1772. G. P. B. 9 D. fol. 638.

(2) Judic. Pract. 3 B. 5 Hoofdst. S. 7.

Execution,
Writ of.

may be put in *execution*, unless by the sentence, having become superannuated, or by the death or change of condition of the party condemned, it be necessary to obtain a decree of the court declaring it executable.⁽¹⁾

In the inferior tribunals nothing further is necessary than to place the sentence in the hands of the marshal; but in the Court of Holland, the *Greffier*, or secretary, must first sign an order for execution on the sentence, which is authority to the marshal to execute the sentence according to its tenor and form.⁽²⁾

SECT. VI.

Service of
writ of
execution
by som-
mation
and reno-
vation.

The first step in execution is *sommation*, i. e. a summons in writing, served by the marshal on the defendant, calling on him to comply with the sentence within twenty-four hours, and pay the costs, on pain of further execution. In the Court of Holland, the *sommation* expresses *literatim* with the sentence what is required of the defendant, and at the same time a copy of the sentence and order for execution⁽³⁾ is served, which is perfectly just and proper.

This is the mode of proceeding in many of the inferior tribunals; but at some places, for

(1) See p. 424. *supra*.

(2) *Judic. Pract.* 3 B. 6 Hoofdst. S. 2.

(3) *Judic. Pract.* *ibid.* S. 6.

example, at *Amsterdam* and in *North Holland*, this is not the practice. The twenty-four hours being expired, and the defendant being in default to comply with the sentence, the *sommation* is repeated, and this second act is termed *renovation*.⁽¹⁾

Service of writ of execution by sommation and renovation.

SECT. VII.

These two acts of execution having been done without effect, further proceedings take place ; but in very different ways, according as the sentence is in a *real action*, and affecting immovable property, or in a *personal action*, whereby the defendant is condemned to the payment of a sum of money, or the performance of some *particular act*, or the sentence has been passed against some one in *his particular quality* or *capacity* as guardian, executor, attorney, &c.*⁽²⁾

Various kinds of execution.

SECT. VIII.

First. *In real actions*, in which any one is condemned to quit, or give up possession of some immoveable property, the sentence is executed by the marshal, properly assisted, ejecting

In real actions.

(1) Judic. Pract. *ibid.* S. 10.

(2) Judic. Pract. *ibid.* S. 3.

* Such person, whether plaintiff or defendant, has the letters q. q. (*i. e. qualitate quâ*), affixed to his name, to signify that he acts as the representative of another.—T.

In real
actions.

the defendant, and putting the plaintiff in possession.⁽¹⁾

SECT. IX.

In personal
actions.

Secondly. In *personal actions* wherein any one is condemned to the payment of a sum of money, the marshal, at the time of serving the renovation, demands *property to be pointed out* in execution sufficient to satisfy the sentence ; at least, the defendant, not having ready-money sufficient to satisfy the debt and costs, is at liberty to assign and give up in execution such goods as he wishes to be first levied on.⁽²⁾ If he does not do this, the marshal is bound, in the first place, to levy upon the moveables, and take thereof as much as may be necessary to satisfy the debt and costs.⁽³⁾

Execution
on per-
sonal pro-
perty.

The goods thus given up in execution or taken by the marshal, are placed by him in arrest, in the presence of two members of the court (*schepenen*).

He then makes an inventory, and keeps them

(1) Ordonn. op't Proced. in de Steden en ten platten Lande, Art. 29 et 30. Reglem. voor de Deurwaarders van den Hove van 28 Maart. 1680. Art 12. Ordonn. op de Man. van Proced. te Haarlem, van 11 Sept. 1751. Cap. 14. Art. 14-16.

(2) Ordonn. op't Proced. in de Steden et Art. 24.

(3) D. Ordonn. Art. 24. Reglement. voor de Deurwaarders, van 1680. Art 14-16.

in his custody for six days.⁽¹⁾ In the mean time he advertises them for public sale, by notice on the Sunday and market-days;⁽²⁾ and if the defendant has not, during these six days, found means to remove the execution, he proceeds to sell. He is not even at liberty to postpone the sale without a request or consent, in writing, on the part of the defendant, which is termed an act of non-interruption.⁽³⁾ The sale in towns must be held on a market-day, and in villages, on a court or session-day of the magistrates. The goods are sold to the highest bidder, and for ready money.

Execution
on per-
sonal pro-
perty.

After the sale and receipt of the proceeds, the marshal deducts from the amount the costs of the execution.

He next pays the plaintiff the debt and costs, and delivers over the surplus, if any, to the defendant, with his account.⁽⁴⁾

SECT. X.

If the defendant or a third person conceives that he has any grounds to oppose the execu-

Opposi-
tion in
execution.

(1) Ordonn. op't Proced. &c. Art. 24. Reglem. voor de Deurw. Art. 14-16.

(2) Ordonn. op't Proced. &c. Art. 24. Reglem. voor de Deurw. Art. 16-17.

(3) Judic. Pract. 3 B. 6 Hoofdst. S. 16 et 17.

(4) Ordonn. et Reglem. d. d. Art.

In the
inferior
tribunals.

sale is advertised on four Sundays' and market-days' in the towns, and by four Sundays' and court or session days' proclamations in the country; also by bills posted in the nearest town. After the sale and payment of the purchase-money, the court grants to the purchaser letters of decree or an act of transfer.⁽¹⁾ With respect to the sale of claims or debts, only one Sunday's, or market or session-day's proclamation is necessary.⁽²⁾

SECT. XII.

Execution
on im-
moveable
property
before the
Court of
Holland.

In the court of Holland, executions on immoveable property are accompanied with many forms and solemnities. The arrest having been made in the presence of two magistrates or members of the town tribunals (*schepenen*), it is communicated to the defendant, as well as to the court; after which, the marshal issues four Sundays' and four market days' proclamations; and on the day of sale, he lights a wax candle and puts up the property for sale, on certain conditions, which are publicly read, and knocks it down to the person who happens to be the highest bidder as the candle is burnt out.⁽³⁾

This sale, however, is merely provisional; the

(1) Ordonn. op't Proced. &c. Art. 25.

(2) Ordonn. Art. 26.

(3) Reglem. voor de Deurw. Art. 24-33. Judic. Prac. 3. B. 6 Hoofdst. S. 23-29.

final sale is made at the roll of the court. For this purpose, the marshal cites all those who conceive they have any interest in the sale to be present *at the passing of the decree of the court*, confirming the sale, and imposing perpetual silence on all those who should hereafter pretend to oppose the same.⁽¹⁾ Of all this the marshal makes a return in writing, and annexes it to the sentence and writ of execution.⁽²⁾

Execution
on im-
moveable
property
before the
Court of
Holland.

On the day fixed for the appearance in court of the parties thus cited, the plaintiff files his claim at the roll for the passing of this decree : every one who desires to oppose this act must then come forward with his reasons for opposition to the aforesaid claim, and join issue thereon, upon which the vouchers on both sides are given in to the court under inventory. These oppositions, however, are rare, the party cited generally consenting to the decree confirming the sale, without prejudice to his right of preference on the proceeds.⁽³⁾

The decree having been passed by the court, an act thereof is made by the secretary, termed an act of *proclamation*, that is, an invitation to all persons who may be inclined to make a higher offer to come forward by a certain day. This

(1) Judic. Pract. *ibid.* S. 30.35.

(2) Judic. Pract. *ibid.* S. 36.

(3) Judic. Pract. *ibid.* S. 37.

Execution
on im-
moveable
property
before the
Court of
Holland.

act is published by the marshal, and also notices of the ensuing final sale are posted.⁽¹⁾

On the day appointed, the property is again put up for sale at the roll of the court, by the secretary who holds the roll, and knocked down to the highest bidder. This proceeding is termed *sale by taking off the seal* from the letters of decree, because the custom is for the senior commissary, during the biddings, to hold in his hand the letters of decree, with the court's seal attached thereto; and when the last bidding takes place, he tears off the seal, as a token of adjudication of the property to the purchaser.⁽²⁾

SECT. XIII.

Judgment
of *Præ* and
Concur-
rence, or
ranking of
creditors.

The money arising from the sale of immovable property under execution must be deposited in the office of the secretary of the court, and afterwards, the creditors are ranked according to their order of preference on these funds; but in case of any dispute on this head, a *claim of preference* is filed by the party, and the court decides the matter.

The debts being thus ranked, and the order of preference regulated, each creditor may take out of the secretary's office the sum adjudged

(1) Judic. Pract. *ibid.* S. 38 et 39.

(2) Judic. Pract. *ibid.* S. 40.

to him, under security to return it in case any person thereafter appear in time with a preferent claim.⁽¹⁾

Judgment
of *l'ræ* and
Concur-
rence, or
ranking of
creditors.

SECT. XIV.

When the defendant has no property whatever, or has not sufficient property to satisfy the sentence, then the plaintiff is at liberty to take his person, and lodge him in prison.

Apprehen-
sion of the
person.

In this case, in the court of Holland, the marshal may apprehend him by virtue of the original writ of execution, without any special warrant for this purpose. When he has taken him, he brings him to the porch, or fore-gate of the prison of the court, where the keeper is bound to receive him, and to lodge him in the *gyzel-chamber* or debtors' ward.⁽²⁾

In the inferior tribunals, when the party possesses no property, he may, according to the common law,⁽³⁾ be apprehended by the marshal; but yet, in some of these tribunals, a judicial order must be applied for and obtained, for this purpose.⁽⁴⁾

(1) Judic. Pract. *ibid.* S. 41 et 42.

(2) Judic. Pract. *ibid.* S. 43.

(3) Ordonn. op't Proced. &c. Art. 28.

(4) For Instance, at Amsterdam, where, before the party's person can be taken in execution, on failure of property whereon to levy, he must be first cited or heard.*

* How very different is this proceeding from the English practice, which begins with execution; and yet Holland is equally a commercial country.—T.

SECT. XV.

Contempt
process, or
execution,
to compel
performance of any
particular
act by *gyzeling* or
civil confinement.

Thirdly. In causes in which a party is condemned *to do any particular act*, for example, to account and answer, and in sentences against any public or corporate bodies, guardians, curators, treasurers, attornies, or others, in their respective qualities,⁽¹⁾ the mode of proceeding in execution is by *gyzeling*, or *civil confinement*.

Gyzeling
with the
inferior
tribunals.

In the town tribunals, and in the country, the party, after sommation and renovation, is served with a notice to appear in *gyzeling* or *civil confinement*, either in the *gyzel* chamber, or apartment appropriated for that purpose, or in some tavern. If he does not present himself, or appear there, he is apprehended and lodged in gaol, until he complies with the decree; but if he does appear daily in *gyzeling*, and yet persists for fourteen days in his contempt, by not obeying the decree, he is kept in *gyzeling*, to remain there in manner aforesaid.⁽²⁾ If he remain a month in civil confinement, and still persists in his contempt, the plaintiff may apply to the court to have the value of the act decreed to be done ascertained, or the damages assessed in money, until payment of which the party must remain in *gyzeling*.⁽³⁾

(1) Van Alphen, papeg. 1 D. 31 Hoofdst. pag. 487. Reglem. voor de Deurw. Art. 36.

(2) Ordonn. op't Proced. &c. Art. 31.

(3) Ordonn. op't Proced. et Art. 32.

The party *gyzeled* is also bound to make such offer on his part as he may think reasonable to satisfy the sentence ; with which, if the other party be not satisfied, then the defendant may apply to the court by motion on petition of *opposition* of execution, and bring the question of the sufficiency or insufficiency of his offer before the court.⁽¹⁾

Gyzeling
with the
inferior
tribunals.

SECT. XVI.

In the Court of Holland, the mode of proceeding by *gyzeling* is a very regular process, and is shortly as follows :—The order for *gyzeling*, or *civil confinement*, is an order served upon the party by the marshal, *fourteen* days after the renovation, to appear in *gyzeling*, or *civil confinement*, on Sunday, in the evening before sunset ; in the prison at the Hague, and there to remain in *gyzeling* until he shall have done the act, for the non-performance of which he is *gyzeled*.⁽²⁾ Previous to the day fixed for the party appearing in *gyzeling*, the other party who obtains the order must settle or ascertain the amount, and give security for the costs.

Mode of
proceeding
by *gyze-
ling* in the
Court of
Holland.

(1) By the Ordonn. op de Man. van Proced. te Haarlem 1751, Cap. 14. Art. 17-31, a regular form of proceeding, more or less in imitation of the practice of the court, has been introduced with respect to civil confinement, which form we could wish to be more universally adopted ; since the remedy of opposition is, for more than one reason, improper in this instance.

(2) Judic. Pract. 3 B. 7 Hoofdst. S. 2.

Mode of
proceeding
by *Gyzeling* in the
Court of
Holland.

On the day appointed for appearing in civil confinement, a visit is made to the gaol, or place appointed for *gyzeling*, in the evening at sunset, and on the following day in the morning, before the roll court opens, to see if the party is there,⁽¹⁾ and on his non-appearance, default is granted against him by the court, the consequence of which is personal apprehension.⁽²⁾

In case the party appears, but continues in contempt for *fourteen* days, personal apprehension is granted against him, and after the expiration of a month, the damages occasioned by his non-performance are assessed.⁽³⁾

In case any question arises as to how far the defendant has or has not obeyed the sentence, the party *gyzeled* may obtain an order to appear before commissaries, to be heard upon the justice or injustice of the order for *gyzeling*. On this order for hearing the plaintiff makes his demand in *gyzeling* before the commissaries, and the other party gives in, in writing, his presentation or offer, containing a declaration in what manner he conceives the sentence may be satisfied; after filing which he is provisionally released. The question is then brought to issue; an exchange of inventory and vouchers is made, and on each side a memorial or deduc-

(1) Judic. Pract. *ibid.* S. 3.

(2) Ampl. Instr. van 1579. Art. 44.

(3) Ampl. Instr. Art. 15 et 16.

tion is given in for the question in *gyzeling* to be decided by the court, on the report of the commissaries.⁽¹⁾

Mode of proceeding by *Gyzeling* in the Court of Holland.

This sentence, in case the defendant's presentation or offer is held sufficient, contains a declaration to that effect, and an order for removal of *gyzeling*. But if the presentation is not deemed sufficient, then the offer of the party is declared by the court to be insufficient, and he is condemned to remain in *gyzeling*, till he shall have complied with the sentence.

This is termed a *decreed gyzeling*. As regards this kind of *gyzeling*, there is no provisional release, but the defendant must remain therein, till he has obeyed the sentence; but if a question arise on this point, he may give in an *act of compliance*, with which, if the plaintiff is not satisfied, he must state his reasons in writing.

In general the defendant then files a further act of compliance, with which, if the opposite party still remains dissatisfied, the court by a sentence in *decreed gyzeling*, determines precisely what shall be held as a compliance with the sentence, without further hearing of the parties.⁽²⁾

SECT. XVII.

In order to proceed after pronunciation of

Liquidation of the sentence.

(1) Judic. Pract. 3 B. 7 Hoofdst. S. 5.

2) Judic. Pract. *ibid.* S. 6.

Liquida-
tion of the
sentence.

the sentence to actual execution, it is necessary that it be for a sum certain ; if otherwise, it must be clearly ascertained by an assessment of damages, &c. ; that is, the precise amount for which execution is to issue, must be previously determined.⁽¹⁾ The cases in which this proceeding occurs, are generally the three following :

Taxation
of costs.

1. *Condemnation of costs* ; these are not to be determined according to our own judgment,⁽²⁾ and then levied for, but they must first be determined by a judicial taxation. For this purpose we file a *declaration of costs*. The defendant then files his exceptions in *diminution* ; the court grants an *act of taxation* by which the costs are fixed at a particular sum, and by virtue of which, in default of payment, execution is taken out.⁽³⁾

Costs, da-
mages, and
interest.

2. *Condemnation for compensation of costs, damages and interest*. When a statement of the amount of these is given to the party, and he is in default, then the plaintiff files what is termed a *declaration of costs, damages and interest*, wherein every item is stated, and he concludes :—“ That

(1) Instr. H. R. Art. 260. Seqq.

(2) Concerning the principles on which respectable practitioners ought to proceed in making out bills of costs, the memorials framed and delivered to the court by the counsellors and attornies at law at the Hague, in the year 1770, deserve to be consulted. They are to be found in my Aant. op Merula's Man. van Proced. 2 D. p. 437-454, and by way of extract, in my Jud. Pract. 4 B. Hoofdst. S. 3-5.

(3) See above pag. 422.

by decree of the court, the costs, damages, and interest, may be taxed at the amount therein expressed with the costs.” Costs, damages, and interest.

The defendant thereon files his objections (*debat*), and the proceedings are then concluded, as in matters of account.⁽¹⁾

3. *Condemnation to take up debat, and liquidate an account.* Taking of accounts before the court.

The account having been made up, and with the vouchers submitted, during a reasonable time to the party entitled to the account, the latter if he objects to any of the items, files his *debat*, and the opposite party his *contra debat*.

The matter then proceeds to issue by what is termed *solution and supersolution*, which are equivalent to *replique and duplique*, or *replication and rejoinder*. An exchange of inventory and vouchers is then made; and lastly, each party gives in his *deductie* or written argument,⁽²⁾ when the costs, damages, and interest, or amount of the account is finally determined by decree of the court, and execution is taken out thereon, as in civil actions.⁽³⁾

(1) Van Alphen, papeg. 1 D. pag. 781. seqq. Jud. Pract. 4 B. 3 Hoofdst. S. 6.

(2) Van Alphen, papeg. 1 D. pag. 793. seqq. Jud. Pract. 4 B. 3 Hoofdst. S. 7.

(3) See S. 9-14. of this chapter.

CHAPTER X.

Of Matters relating to Estates, which are taken under the Controul and Protection of the Court.

SECT. I.

THE estates of those who become insolvent, or obliged to stop payment, also abandoned estates, and those to which no heir is found, require an especial provision on the part of the court, within whose jurisdiction they are. In many places there are special ordinances on the subject,⁽¹⁾ and in the great cities there are particular chambers for this purpose. It is clear where such ordinances exist, they must govern in the first place ; but where there are no local ordinances, the following rules may serve as a guide.

SECT. II.

Appoint-
ment of
sequestra-
tors, or
curators.

The judicial provision in the case of insolvent estates takes place, either on the application of the debtor himself, or of one or more of his creditors, on sufficient proof of their having a lawful and just claim, and of his undoubted

(1) These are to be found in the several publications of the local ordinances:—there are also several to be met with in the Gr. Pl. Boek ; particularly the IVth. vol.

inability to pay, or if the writ of *Cessio Bonorum* has been applied for, by the debtor himself, who has thus declared his own insolvency; or it is granted because the estate has been abandoned, or is unadministered.

Appoint-
ment of
sequestra-
tors, or
curators.

This judicial provision consists in the appointment by the court of one or more fit persons to take charge of and administer the estate,⁽¹⁾ who are named *Sequestrators or Curators*.

SECT. III.

Their duty is directly on their appointment, and if need be, with commissaries of the court to repair to the house of the debtor, and there immediately to place under seal all the coffers, chests, and writing-desks, with the counting-house and what further may be deemed necessary; to seal up also all books and papers, and to place them in security; and further, to place a proper person in possession to take care of the property.

Their duty.

When, however, the debtor, with his whole family, has quitted the house, it is shut up by order of the judge.

Their duty besides, is to take immediately an inventory of the property, to sell that which is of a perishable nature, to collect and get in the outstanding debts with all diligence, without however commencing any suit, except under

(1) T. t. ff. de curat. bon. dando. ibique. D. D.

Their duty. the sanction of the court on application, and to bring in and deposit the monies thus collected at the secretary's office for greater security.⁽¹⁾

SECT. IV.

Accord, or composition with creditors.

In this case it frequently happens that the debtor, whose property is thus placed under the administration and authority of the court, makes some kind of composition with his creditors in order to extricate himself from his difficulties, and again recover possession of his property.

He may also effect this when by any local law or regulation the lesser number of creditors are bound to follow the greater, in case all are not of one mind ;⁽²⁾ but where there is no such law, and consequently the common law prevails, according to which no creditor is bound to submit to any agreement or composition whereby an abatement is made of his just claim,⁽³⁾ the authority of the judge can effect but little, therefore the authority of the sovereign to confirm the accord in such case is absolutely necessary, and it has of late years been applied in several instances.⁽⁴⁾

(1) Matthæus, de Auction. Lib. 1. Cap. 7.

(2) Such laws we have at Leyden, Haarlem, Amsterdam, and elsewhere, V. D. Keessel, Thes. Jur. Holl. et Zeel. Thes. 829.

(3) Ordonn. van Keizer Karel van 19 Meij 1544. Art. 35.

(4) Resol. Holl. 22 Julii 1779. G. P. B. 9 D. pag. 551.

SECT. V.

For further liquidation of the estate it is necessary to summon the creditors by public advertisement in the Gazette, to bring in their claims to the secretary's office;—

Further
liquidation
of the
estate.

That all the property, of whatever description, be sold and converted into ready money, i. e. the immoveable property at the usual time of the year for such sales, and the moveable property at such time, as according to the special custom of each place, is considered the most advantageous;—and that in general the estate be brought to liquidation as soon as possible.

SECT. VI.

After this liquidation is effected, the sequestrator or curator must render his accounts, which after the creditors have been cited for this purpose are passed in court.⁽¹⁾

Account
and pre-
ference.

The creditors then who have made any claim must prove their debts before the judge; after which the whole amount of the estate is divided between such creditors as have proved, which is termed holding a judgment of *Præ and concurrence*,⁽²⁾ and in pursuance of this decree, each

(1) Voet, ad tit. ff. de curat. bon. dand. n. 10.

(2) Matthæus, de Auction. Lib. 1. Cap. 17.

504 MANNER OF PROCEEDING IN CIVIL CASES.

**Account
and pre-
ference.**

of the creditors is at liberty to take out of court the sum adjudged to him under security to refund whenever a person with a preferent claim shall appear.

PART II.

MANNER OF PROCEEDING IN CRIMINAL CASES.

CHAPTER I.

Of the Commencement of Proceedings in Criminal Prosecutions in general.

SECT. I.

As in all *civil* cases, three persons are requisite as parties, a *plaintiff*, a *defendant*, and a *judge*; so, also, three are necessary in a regular *criminal* process; an *accuser*, a *party accused*, and a *judge*; each of these has his special obligations and duties, which we shall shortly unfold.

What parties are necessary.

SECT. II.

Although, according to the Roman law, the power of becoming an accuser was free to every one⁽¹⁾ on his submitting himself to the same punishment in case he should be found to have brought a false accusation,^{(2)*} yet this principle

The accuser.

(1) S. 1. Instr. de publ. jud.

(2) L. 3. L. 7. ff. L. ult. C. de accus. et inscr.

* The mode of proceeding in the Roman law in these

The ac-
cuser.

has not been adopted in our country, where the prosecution of crimes belongs to the sovereign,⁽¹⁾ who, for the purpose of instituting the necessary proceedings, has appointed for each court of criminal jurisdiction a public accuser under the title of *head officer, high sheriff, bailiff, or the like.*⁽²⁾

(1) De Groot, Inleid. 3 B. 4 D. S. 5. 32 D. n. 16 et 33 D. S. 3. n. 7.

(2) P. Van Spaan, Verhandeling over het hooge Regtsgebied in Holland en Westvriest. (vHage 1780.)

cases was as follows. The accuser first gave in to the judge, or inscribed on the public tables his charge against the party, with a pledge or security to prosecute to conviction. This was termed the *denunciatio* or *inscriptio*, and was nearly similar in form to our indictment.

The next step was the undertaking of the accuser to submit to the same punishment in case he should be found to have brought a false accusation. For the benefit of the curious reader, the following forms are given from Brissonius.

“ DENUNCIATIO.

“ *Cos illis die illo apud illum prætorem vel proconsulem L. Titius professus est se Mæviam lege Julia da adulteriis ream deferre, quod dicat eam cum G. Sejo in civitate illa, domo illius, mense illo, consulibus illis adulterium commississe.*”

See ff. L. 48. tit. 2. lex. 3. de accus. et inser.

“ SUBSCRIPTIO.

“ *Ego ille adversum te in rationibus publicis adsisto. Si te injuste interpellavero et victus exinde apparuero, eadem pœna, quam iu te vindicare pulsavi, me constringo, atque conscribo, partibus tuis esse damnandum et pro rei totius firmitate manu propria firmo, et bonorum virorum iudicio roborandum dabo.*”

SECT. III.

With respect to the *party accused*, there is little to observe, except that he must be a person capable in law to commit a crime. No criminal proceedings can be instituted against persons who have not will or understanding; for instance, insane persons, infants, &c., who are incapable of committing crimes.⁽¹⁾ But the law makes no distinction in the case of minors or married women, since the assistance of father, guardian, or husband, is not allowed in criminal cases in *extraordinary process*.⁽²⁾

The party
accused.

SECT. IV.

To sit as judge in criminal cases, it is necessary,

The judge.

1. That the judge be vested with *high jurisdiction*. In the towns this belongs to the *bench of magistrates (schepenen)*, who have of old had jurisdiction to try offences committed by the citizens or inhabitants of their respective towns.⁽³⁾

(1) See p. 280 et seqq. supra.

(2) See p. 105, supra.—With respect to this point, as in many others, we cannot agree in opinion with Prof. Voorde, Aant. op. den. Crim. Styl. Art. 6. (pag. 427). The practice universally adopted in this country, and founded on a just analogy of the law, rejects the husband, of course.

(3) A number of town charters on this subject are to be found collected in Mieris Chart. Boek. 2 D. p. 808. 3 D. pag. 87 et 125, and in many other places.

The judge. In different districts of Holland, the high jurisdiction is exercised by bailiffs and the good men of the district (*Welgeboren Mannen*); as for instance, the high tribunals of *South Holland*, *Kennemerland*, *Rhynland*, *Schieland*, &c.⁽¹⁾

In several large villages, also, the bench of magistrates (*schepenen*), has high jurisdiction, and is competent to take cognizance of criminal offences.⁽²⁾

2. It is necessary that he be the competent, *i. e.* the ordinary or natural judge of the party accused.

It is, in this respect, an indisputable right, that no inhabitant of the lands of Holland and West Friesland be imprisoned or tried by any other than the officers, or before the judge, who are both with respect to him thus qualified,⁽³⁾ except in the case when the party has fled from justice, or is caught in *flagranti delicto*: the meaning of which law is, that, in the first place, the judge, whose jurisdiction extends over the territory within which the party is *domiciled*, is competent to try him, and that the judge of the *place where the crime is committed* is not otherwise competent than when he has taken the

(1) See p. 389, *supra*.

(2) In Rhynland, for instance, there are many which are independent of the bailiwick.—S. Van Leeuwen. *Cost. v. Rhynland*, *Inl.* pag. 19.

Plac. Holl. 15 Septemb. 1677. G.P.B. 3 D. fol. 1385.

party in *flagranti delicto*, or when the party, The judge.
 having fled from justice, he has cited him to
 appear.⁽¹⁾ Vagabonds, or persons of that de-
 scription, who have no fixed domicile, are sub-
 ject to the jurisdiction of the place where they
 are apprehended.⁽²⁾

SECT. V.

In some cases the court of Holland is also The court
of Holland
when com-
petent.
 competent in the first instance:—

1. When members or officers of the court
 have committed any crime.⁽³⁾

2. When the jurisdiction of an inferior tri-
 bunal is barred by non-prosecution within the
 limited time,⁽⁴⁾ in which case the court is en-
 titled to take cognizance by *prævention*.⁽⁵⁾

In all these cases the right of the sovereign

(1) Verkl. Holl. 16 Dec. 1678.—G. P. B. 4. D. fol. 499,
 where a typographical error, very contrary to the meaning of the
 law, has crept in.—See folio 500. Col. 2. in init. where we
 read, “*The officers and judges of the places*,” &c., instead of
 “*The officers and judges having jurisdiction over the territory in
 which the delinquents reside, with exclusion of the officers and
 judges of the places*,” &c.

(2) Crimin. Ordonn. Art. 50.

(3) Provis. Ordre van 27 September 1614. Art. 9. Resol.
 Holl. 14 Maart 1765. Art. 3.

(4) Instr. Hof. Art. 8.

(5) Bort, Tract. van Crimin. Zaak. Tit. 1. n. 51. Zurck,
 Cod. Bat. voc. delicten. S. 7. et ibi not.

The court
of Holland
when com-
petent.

is sustained before the court by the *Advocate Fiscal, or Attorney-General of Holland.*⁽¹⁾

SECT. VI.

By what
laws to
proceed.

Both public accusers and judges are bound in criminal cases to proceed conformably to the law; by which we understand *the ordinance relating to criminal justice, and the style or manner of proceeding therein,* both published by authority in the year 1570.*⁽²⁾

These, however, should be tempered and qualified by a just and regular practice, as we see done by the most eminent criminal courts. This qualification, we conceive, to be absolutely necessary; since, although no one can with reason deny that these ordinances have still the force of law in this country,⁽³⁾ yet they exhibit in so many respects the marks of the uncivilized state of the age in which they were framed, that it is to be lamented, that notwithstanding the

(1) Judic. Pract. 1 B. 3 Hoofdst. S. 19.

(2) Professor Voorda has given us both these ordinances very accurately in his *Verh. over de Crimin.* (Leyden 1792, in 4to.)

(3) Voorda, d. l. Inleid. S. 5. pag. 8.

* A translation of the latter from the original Dutch, is to be found in the report on the criminal law in force at Demerara, presented to Earl Bathurst by the Translator.—See p. 105, note, *supra*.

repeated commissions⁽¹⁾ issued for this purpose, no better *ordinance to regulate the manner of proceeding in criminal cases* has hitherto been framed, nor the uncertainty which prevails in the present mode of proceeding removed.

By what
laws to
proceed.

SECT. VII.

When any offender is found in the *mainour*, or in *flagranti*, committing an offence subjecting him to corporal punishment, the public accuser is empowered, nay even bound, without previous notice to the judge to secure him. This is termed apprehension in *flagranti* or *op heeter daad*. To constitute an apprehension in *flagranti*, it is not absolutely necessary that the party be seized at the very moment of committing the offence, provided he be taken on fresh suit shortly after *when fleeing or concealing himself*.⁽²⁾ All which must be left to the discretion of the judge. So soon, however, as the apprehension in *flagranti* has taken place, the public accuser is bound to give information to the

Apprehen-
sion in
flagranti
delicto.

(1) A fine historical account relating to this subject may be found in the introduction to the works of P. Voorda.—The *manner of proceeding* framed by a commission nominated for that purpose in 1799, certainly contains a great deal of what is good; but the time was too unfavourable, and it would be necessary to revise it.

(2) Matthæus, de jure gladii. cap. 38. n. 9.

Apprehen-
sion in
flagranti
delicto.

judge and request thereon his approbation or sanction.⁽¹⁾

SECT. VIII.

Original
deposi-
tions and
informa-
tions.

According to the general rule, all criminal prosecutions must be commenced by instituting an investigation and collecting evidence,

1. That a crime has actually been committed, or as it is technically termed, proof of the *corpus delicti*. To this pertains the inquest on the dead body; the examination of places in which a breaking has been effected, as in cases of house-breaking, burglary, and the like.⁽²⁾

2. To ascertain who is the person that has committed the crime. For this purpose the public accuser collects his *previous informations*. As far as these consist of the declarations of witnesses, which is generally the case, he must bring the parties themselves before the judge, who after hearing them, is to determine whether he will or not grant a warrant of apprehension,⁽³⁾ and it is an abuse in practice to put into the hands of the judge, as *previous informations*, private or notarial declarations, which the officer himself has caused to be drawn up; since the judge ought always to hear the witnesses

(1) Crimin. Ordonn. Art. 50.

(2) See p. 360, *supra*.

(3) Crimin. Ordonn. Art. 51.

themselves, as the taking of informations pertains directly to his office.⁽¹⁾

Original
deposi-
tions and
informa-
tions.

SECT. IX.

All criminal proceedings, after duly collecting and obtaining the necessary *previous informations*, are instituted in one of the two following ways; either by *personal apprehension*, or by *citation to appear in person*.

Apprehen-
sion.

The circumstances necessary to justify a warrant of apprehension, besides the general requisites of proof of the *corpus delicti* and the proper *previous informations*, consist in this, that the offence, of which the party is accused, involves corporal punishment by law, to inflict which the person of the party is necessary;⁽²⁾ but if no such law appears, or it is very doubtful whether the offence can be proved to be of such a nature, then no warrant of apprehension can be granted, and the proceedings must be by personal citation.⁽³⁾

(1) Crim Stijl. Art. 4. and there the Aant. v. Prof. Voorda, pag. 280.

(2) P. Bort, Tract, van Crim. Zaken. Tit. 5. n. 8.

(3) How necessary it is to recommend circumspection to a criminal judge in this case! Indeed, the imprisonment of an inhabitant is not to be trifled with; an imprisonment which casts a reproach on his honour, and occasions a pecuniary loss to him, which a subsequent release cannot completely obliterate. And, above all things, the most conscientious care should be taken by the sheriffs and bailiffs that their officers, who are

Apprehen-
sion.

As it very frequently happens that those who have committed some crime involving corporal punishment, through fear of prosecution betake themselves to flight, and thereby prevent the public accuser from apprehending them ; therefore, all *criminal writs* by the court, and *decrees of apprehension* by the town tribunals, contain in them a further clause empowering the fiscal or sheriff, in case the party has fled, and so cannot be apprehended, to cite him, by public edict and notice at his last place of abode, to appear in person, on pain of banishment.⁽¹⁾

According to law, *the term of fourteen days* between each edictal citation is sufficient, which citation, if the accused does not appear, is to be repeated three or four times.⁽²⁾ However, in many places the practice is for the terms to be *from six weeks to six weeks*, and this I must confess seems not to be without reason ; but to publish these edictal citations in the newspapers, as is the custom in some places, seems unnecessary and superfluous.

oftentimes men too presumptuous and overbearing in the exercise of their duty, and deficient in education and honesty, act with more regularity in this respect than, alas ! we often witness.

(1) Van Alphen, papeg. 1 D. pag. 581. S. Van Leeuwen, Cens. For. Part. 2. Lib. 2. Cap. 6. n. 9.

(2) Crim. Stijl. Art. 53.

SECT. X.

When the question whether the offence involve corporal punishment does not seem sufficiently clear to the judge, and he thus finds no grounds for a warrant of apprehension, the next thing to be considered is the *citation to appear in person*. Although this mode of proceeding is far from being of so severe and prejudicial a nature as that of *apprehension*, yet it is so injurious to the character of the party, that a citizen should not be exposed to it but in a case of urgent necessity, and therefore the act for which any one is cited to appear in person should always be of that serious nature that the law considers it as an offence involving a criminal punishment.⁽¹⁾

Summons
or citation
to appear
in person.

In trifling cases, in which a slight correction or reprimand is held sufficient, no citation in person should be granted, and this is particularly to be observed in cases which are only punished by fine, since in these the public officer may proceed *ordinario modo*, as in a civil action, without any warrant.

The decrees and orders of citation in person are not communicated to the party, nor any copy thereof; but a warrant is merely served upon him by which he is summoned to appear personally in court on a certain day.

(1) Bort, Tract. van Crimin. Zaken. tit. 5. n. 43. en Volgg.

Summons
or citation
to appear
in person.

In the lower courts, in this act or warrant, and also in the edict or citation, the offence for which the party is cited to appear must be expressed.⁽¹⁾ In the Court of Holland, the crime with which the party is charged is not expressed in the personal citation.⁽²⁾

SECT. XI.

Other
modes of
instituting
criminal
proceed-
ings.

All modes of commencing criminal proceedings, except by decrees of personal apprehension and personal citation, are irregular, and not to be followed.

1. That the bailiff, or head officer, of the district, should, of his own authority, and without a judge's order, apprehend, in cases which, although subject to corporal punishment, yet cannot be termed cases in *flagranti*, is a practice so pernicious that it cannot be too strongly censured.⁽³⁾

2. An indirect method of procuring the attendance of the party accused is sometimes practised, namely, in the case of one against

(1) Crimin. Stijl. Art. 53.

(2) Bort, Tract. Crimin. tit. 5. n. 30. It has been doubted, and in our opinion justly, whether this practice of the court can be considered as just and proper. Voorda, over de Crimin. Ordonn. 1 Hoofdst. S. 25 et 26. pag. 93. seqq. et pag. 398.

(3) Crimin. Ordonn. Art. 50. en aldaar S. Van Leeuwen, in zijne Aanteek.

whom there is a certain degree of suspicion, but not strong enough to ground a decree thereon, to send for or request his attendance,⁽¹⁾ to question him in the matter, and when any thing tending to criminate him is obtained from his own answers, then to apprehend him ; but this method is not to be commended, and ought to be banished from all tribunals.

Other
modes of
instituting
criminal
proceed-
ings.

3. Sometimes also the proceeding commences by placing the *accused* provisionally in civil arrest or *gyzeling*. In crimes of magnitude, but in which the author cannot for certain be ascertained without some confession or acknowledgement from his own mouth—for example, the truth or falsehood of any signature by him—it is safer to proceed in this way, than in the first instance to affect any one with the indelible stigma of a criminal apprehension ; but yet the protection and liberty of the subject require that even this method should be practised as seldom as possible, since we cannot be too cautious and circumspect when about to do an act which deprives a fellow-subject of his liberty, even under the specious name of *civil arrest*.⁽²⁾

(1) Is an inhabitant obliged to obey such requisition ? At Leyden there is an express law relating to it. See the 85th By-law of that city ; but at places where there is no such law, we ought to obey, out of respect for our sovereign or judges ; but then such requisition should not be intended to entrap us.

(2) Jud. Pract. 4 B. 5 Hoofdst. S. 7.

Other
modes of
instituting
criminal
proceed-
ings.

4. Lastly, there is sometimes also in use with us a proceeding known under the name of *political arrest*. In cases of urgency, and for the preservation of the public security, the government or magistrates may sometimes find themselves placed under the hard necessity of securing the persons of particular individuals; but this is at all times a dangerous expedient, and ought never to be resorted to but in cases of absolute necessity.⁽¹⁾

SECT. XII.

Writ, or
manda-
ment of
purgation.

In treating of criminal cases in general, we must not omit to notice shortly the practice termed *purgation*,⁽²⁾ by which any one who is affected by any report in circulation of his having committed some crime, and who is desirous to clear himself publicly from such imputation, may by petition to the Court of Holland, which is undoubtedly competent in this case,⁽³⁾ obtain a *writ or mandament of purgation* against the officer of the place, the attorney-general of the court, and all

(1) H. De Groot. Apolog. Cap. 13. vooral, pag. 138.

(2) With respect to this mode of proceeding, see P. Bort, Tract. v. Crimin. Zaken. tit. 3. van Purge. W. Van Alphen, papeg. 1 D. 34 Hoofdst. pag. 514-528, et 2 D. pag. 504-510.

(3) Instr. Hof. Art. 8 et 226.

others who may think proper to appear against him.*⁽¹⁾

Writ, or
manda-
ment of
purgation.

On the day fixed in the writ, the party appears at the roll, with head uncovered, and by his attorney, files his claim, "That he shall be declared clear and innocent of the crime in the writ mentioned, and that by provision he shall be released from personal appearance, and permitted to appear by attorney, under promise by *hand-tasting*, at all times when summoned, to appear again in person."

The claim being made, the officer or attorney-general is at liberty to demand that the party may be examined upon interrogatories.⁽²⁾

Sometimes also the officer pleads *prævention*, or that cognizance has already been taken of the cause previously to the issuing of the writ of purgation.

This is held to be the case, and the plea of *prævention* good, not only when before the service of the writ of purgation a decree or warrant had already issued against the party, but also

(1) Van Alphen, papeg. 1 D. pag. 519.

(2) Van Zurck, Cod. Bat. voce Purge. S. 1. n. 5. in not. Manier van Proced. van 1729. Tit. 23. Cap. 5. n. 9. De Haas, in not. op Merula's Man. van Proced. Lib. 4. Tit. 24. Cap. 12. n. 10. pag. 421.

* See p. 426 supra.

Writ, or
manda-
ment of
purgation.

when previous to that time judicial informations had been taken.⁽¹⁾

When, by proofs, hearing interrogatories, or otherwise, the innocence of the party is far from being established, this rash measure on his part is followed by a criminal prosecution, either in ordinary or extraordinary process, and with or without imprisonment, according to the nature of the case.

(1) Leonii Decis. Cas. 2, 15, et 60. en aldarr Boel, in not.

PART III.

OF EXTRAORDINARY CRIMINAL PROCESS.

SECT. I.

THE accused being apprehended or cited in person, the investigation commences in *extraordinary process*. By this is understood nothing more than a judicial inquiry into the matter, according to the evidence already obtained, and which consists in hearing the accused upon interrogatories, and the confronting him with the witnesses and accomplices, in order, by this means to bring him, if possible, to confession of the crime with which he is charged.⁽¹⁾*

Extraordi-
nary pro-
cess.

We may here ask, whether the extraordinary

(1) It is thus defined by Bort, van Leeuwen, and all other writers on Criminal Law in this country. It is founded on the immemorial practice of the court, and all other criminal tribunals. Prof. Voorda, however, in his before-mentioned treatise on the Criminal Ordinance, endeavours to establish a system totally different. He regards the systems of Bort and Van Leeuwen as erroneous; he is pleased to call the present extraordinary process monstrous, (pag. 100); he requires the examinations

* See page 534, *infra*.

Extraordi-
nary pro-
cess.

process in criminal cases, as here defined, be just or not? Certainly it cannot be disputed, that sometimes this process has been abused, either through the ignorance or corruption of judges and officers, to the oppression of innocent persons. But since all legal forms and modes of proceeding, give rise to abuses, when badly applied;⁽¹⁾ if we were, on this ground, to banish from practice a proceeding in other respects useful and necessary, we should then fall into another and worse extreme;* for it is established

when the fact can be proved by witnesses; no confrontations of witnesses with the accused, but only with accomplices; he is a pretty strong advocate for the torture, even in such cases in which the evidence is far from complete. Strange and singular ideas! We willingly respect the memory of a man who, with regard to the knowledge of the Roman law, was really great; but how much information soever his treatise may contain, we prefer, for the practice in criminal cases, a just and intelligent judge, who daily attends examinations, to a man of erudition in his library.

(1) “*Cùm rectè procedunt Judicia, delubra sunt æquitatis; cum depravatè, foveæ fallaces et cæcæ.*” Ammian Marcellin, Lib. 30. Cap. 4. pag. 487. Edit. Ernest.

* That this is still the practice on the Continent, notwithstanding the abolition of the torture, must be admitted; how far the reasoning of the learned author is satisfactory on this grave question, is left to the judgment of the reader; but the translator must observe, that he always felt this to be the most disagreeable and revolting part of his duty, while President of the Courts of Demerary.

See his letter to Mr. Goulburn on the subject, Dec. 7, 1819; in the Criminal Report above referred to, and page 535, *infra*.

by the most incontestable evidence, that if the *extraordinary process* (confining it however within the strict limits of justice) were not applied in criminal cases, the most heinous crimes which are committed in privacy and darkness, and in which the accomplices are sometimes not to be discovered, as burglaries, forgery, and the like, would remain unpunished.⁽¹⁾

Extraordi-
nary pro-
cess.

SECT. II.

Before we treat of the course of a criminal inquiry, instituted in extraordinary process, it may be proper to notice shortly the *requests* and *incidents*, which may occur during the proceedings.

Requests
and inci-
dents in
this pro-
cess.

1. These rarely occur in extraordinary process, against a party already apprehended, except in the case of a man who has been lodged in prison, by virtue of a decree of a judge, whom he conceives to be *incompetent*. But in what way is this plea, or *exception of incompetence*, to be proposed?

The law on this head is very obscure and

(1) P. M. Renazzi, de Ordine seu forma judiciorum criminalium, (Rome 1777, in 8vo.) E. Luzac, Diss. de modo extraordinem procedendi in causis criminalibus. (L. B. 1759.) H. Calkoen, Verhand, over het voorkomen en straffen der Misdaaden. in de Verhand. van't Genoodschap, Floreant Liberales artes. 2 D. 2 Stuk. pag. 211-228.

Requests
and inci-
dents in
this pro-
cess.

vague.⁽¹⁾ The states of Holland have, in a certain case declared that this must be done by petition, and a summary proceeding thereon.⁽²⁾ Afterwards the court of Holland complained of the irregularity of this mode of proceeding.⁽³⁾

It is however certain that these points should be treated in as summary a way as possible, and without trenching on the forms to be observed in extraordinary process.⁽⁴⁾

2. In proceedings on a personal citation, the officer on the day of appearing makes a request immediately,⁽⁵⁾ “that the party shall be ordered to answer on interrogatories given in to the court;” opposition to such an application is a thing unheard of, since the citation to appear in person, so long as it is not changed into a simple citation, involves, as an indisputable consequence, the obligation of the party to answer upon interrogatories; consequently, the person thus cited is accustomed to declare by his attorney, by a minute on the roll, “that he is ready to answer upon the interrogatories to be put to

(1) Crimin. Stijl. Art. 19.

(2) Resol. Holl. 9 Jann. 1744. G.P.B. 7 D. fol. 969.

(3) Missive van't Hof. van 6 Meij, 1744, to be found among the vouchers of the process of V. D. Mieden.

(4) See on this Professor Voorda, Aant. op. den Stijl. Art. 19. p. 311. et seqq.

(5) Professor Voorda, Aanteek, op den Stijl. Art. 52, strongly objects to this request at the Roll. He is perfectly right; but it is practice, and we must follow it, so long as it is not altered.

him, provided, after he has fully answered, he may have copies thereof, with his answers.⁽¹⁾

Requests
and inci-
dents in
this pro-
cess.

3. As in the citation to appear in person, the crime must be expressed, it has become the practice, when it has not been expressed, or is expressed in a vague and uncertain manner, to make *request of the specification of time, place, and other circumstances of the crime charged*.

To determine, therefore, whether the request is well founded, this question must be resolved: is the expression in the citation so indefinite, that the party cannot collect therefrom on what matter he is to be examined? In such case the request is just; but if its object be, to have all the special circumstances stated before hand, then this relates to the examination itself, and is merely a trick of practice.⁽²⁾

4. When any one is personally cited to appear on a matter involving corporal punishment, but of which the proofs obtained by the previous informations are too weak to justify personal apprehension, and, after one or more examinations, the guilt of the party becomes more clear; the public accuser in such cases makes a *request of incarceration*. This request is made secretly, the party is not apprised of it, and the judge disposes of it according to his conscience.⁽³⁾

(1) Judic. Pract. 4 B. 5 Hoofdst. S. 6. pag. 227.

(2) Judic. Pract. d. 1. pag. 226.

(3) Crimin. Stijl. Art. 52.

SECT. III.

Hearing
upon ar-
ticles or in-
terrogato-
ries.

The first and principal part of a criminal prosecution in extraordinary process, is the *hearing* of the person apprehended, or cited to appear, in person, upon articles.

1. This must be done within twenty-four hours after apprehension, and the second examination must take place as soon as possible afterwards; for it is the duty of the judge to render the imprisonment of the party as short as possible.⁽¹⁾

2. The questions put at the hearing or examination, must be founded on the preceding informations, and so framed as to admit of being answered by a simple *yes* or *no*. It is permitted however to call upon the party to state the circumstances of the case, to give reasons for his answers, to explain any thing that is doubtful or contradictory in them, and the like.⁽²⁾

3. Diffuseness, by which the matter is confused, and an innocent person put in danger of contradicting himself, is an unpardonable fault in criminal examinations on articles. The questions ought in such cases to be concise, and not to contain two or more distinct facts in the same article.⁽³⁾

(1) Crimin. Stijl. Art. 6.

(2) Judic. Pract. 4 B. 5 Hoofdst. S. 9.

(3) Judic. Pract. d. l.

4. They should also be clear, simple, and precise, divested of all unintelligible or foreign words, and expressed in a style, neither complicated nor abstruse.

Hearing
upon ar-
ticles or in-
terrogato-
ries.

If it is observed that the party does not comprehend the question, it ought to be clearly explained to him in other words.

5. All questions of an entrapping nature, and calculated to ensnare the prisoner, must be avoided, such as those in which a fact is assumed as already proved, and reasoning therefrom, as the basis of the question, although the party has not even been heard upon it, much less confessed it.⁽¹⁾

6. In the setting down the answers of the prisoner, we must as far as possible use his own words, lest by too great alteration the facts be distorted, or placed in a wrong light, or the prisoner be made to say something altogether different from what he meant.

7. The examination of the prisoner must be taken without oath, from the manifest danger of perjury.⁽²⁾

8. Since it is the duty of the judge, and even

(1) Judic. Pract. d. l.

(2) Voet, ad tit. ff. de jurejur. n. 10. Whatever the Crim. Stijl. Art. 6. ordains on this subject, it is certain that it has not been adopted in our practice. How is it possible that Prof. Voorda, in his Aant. on that Art. pag. 290, could still start doubts with respect to it?

Hearing
upon ar-
ticles or in-
terrogato-
ries.

of the public accuser, to conduct the inquiry as much with the view of establishing the *innocence* as the *guilt* of the prisoner,* he is bound to hear the witnesses called on his behalf, and also to receive the papers produced in defence of the accused, by his family or friends, (*memoriën van suggestie*).⁽¹⁾

9. Lastly, after each examination, (in some places at the final close of the examinations), the interrogatories and the answers of the accused thereto, must be again read to him, to see whether he has any thing to add to, or alter therein, and then, as at the examination, it is signed by the party.⁽²⁾

SECT. IV.

Confronta-
tion of the
party with
the wit-
nesses. &c.

When the accused denies the charge against him, the nature and object of extraordinary process is to bring him by proper means to conviction and confession.

Thus, besides examining the accused on articles, it may also be useful, for example, to place before him the goods stolen, the iron crows or instruments of housebreaking, the weapon or instrument with which the wound has been inflicted, &c. These things operate frequently

(1) Crimin. Stijl. Art. 46.

(2) Crimin. Stijl. Art. 11.

* See p. 22 et 40, Criminal Report.—T.

much more to produce conviction than the most subtle question.

Confronta-
tion of the
party with
the wit-
nesses, &c.

But above all, we make most use in this process of the means of *confrontation*,⁽¹⁾ or placing the accused in presence of his accomplices and the witnesses. *The confronting him with his accomplices* can only be of use in the case of secret offences, particularly with respect to special circumstances, in order to come at the truth. In other respects, the evidence of accomplices is utterly inadmissible by law;⁽²⁾ and therefore, in passing sentence, no further weight should be given to their evidence than that of illustrating and completing other proof.⁽³⁾

But the confronting of the accused with the witnesses is, as it were, examining them in *forma probanti*, according to the nature of *extraordinary process*. This practice may not only serve to tax the prisoner to his face with the crime, and by that means shake his obstinacy or firmness

(1) Whatever Prof. Voorda, S. 12. pag. 64. et seqq. and Aant. op den Stijl. Art. 13. pag. 299, may object to the method of *confrontation*, we must entirely differ with him in opinion, and consider it one of the most liberal as well as most proper means to obtain confession in extraordinary process.

(2) L. 3. S. 5. ff. de testib. L. 11. C. eod. L. 17. C. de accus.

(3) H. Coccejus, in Exerc. curios. Tom. 2. Disp. 30. de Socio Criminis. Boehmer ad Const. Crim. Carol. Art. 31. pag. 143-152.

Confronta-
tion of the
party with
the wit-
nesses, &c.

in denying it, but it also affords him an opportunity to state what he has to say against the witnesses themselves, and by entering into conversation with them, thereby weaken or strengthen their credibility.⁽¹⁾

SECT. V.

Confession
of the pri-
soner, and
demand of
public pro-
secutor
thereon.

The consequence of *hearing upon articles* and *confrontation* is, very frequently, that the accused is thereby brought to *confession* of the charge against him.

For this *confession* to be perfect, and judgment passed thereon, it is not sufficient that the accused acknowledge the act: he must also acknowledge that it is of a criminal nature, and punishable, unless it be so implied by the very name of the act itself, that it could not be understood otherwise than as a criminal act; for example, a party acknowledges to have coined money; by the confession of this act, he acknowledges at the same time the crime, without the necessity of adding any thing more on his part, since the coining of money without the authority of the sovereign is a crime at common law; but when, for instance, any one acknowledges to have written a book in which the public accuser conceives there are certain libellous expressions, but which the author denies to

(1) Quistorp, Grundsätze des Deutschen Peinlichen Rechts, 2 Th. 14 Hauptst. S. 713-721.

have such tendency ; in this case, the confession is imperfect, and judgment cannot be passed on it.⁽¹⁾

Confession
of the pri-
soner, and
demand of
public pro-
secutor
thereon.

When the confession, in the way above mentioned, is perfect, and thus amounts to a *criminal confession*, the public accuser gives over with his observations and opinion, the vouchers to the judge, requesting permission to found his criminal claim upon the confession of the prisoner. The judge, if he is of the same opinion, makes an order, permitting him to pray the sentence of the court upon the prisoner's confession, and to file his criminal claim and demand.⁽²⁾

This claim and demand contains a circumstantial detail of the crime, taken from the examinations of the accused, and in some parts it is strengthened and amplified from the preceding informations. Then follows a statement of the criminality of the act, and of the particular law against which the party has offended, and it concludes by praying the punishment awarded by law to the offence.

As, however, according to our criminal law,

(1) With respect to this important distinction, see the Counter-memorial of the High Court in the cause of Adrian Van der Mieden, L.L D., as also the Memorial in the Cause of Hespe and Verlem (Amst. 1786).

(2) Public. van het Uitvoer. Bewind van 10 Oct. 1798. Art. 3 and 4.

Confession
of the pri-
soner, and
demand of
public pro-
secutor
thereon.

the punishments are seldom exactly defined, but for the most part left to the discretion of the judge,⁽¹⁾ it is prudent on the part of the public accuser, and, in fact, the custom is, after praying a certain definite punishment, to add a general prayer, "*or such other punishment as the court shall deem just and meet.*"

(1) Matthæus de Crimin. in Prolegom. Cap. 4. n. 10, et Lib. 48. Tit. 18. n. 31.

CHAPTER III.

Of Criminal Proceedings on Conviction.

SECT. I.

IT frequently happens that the accused, in order to escape punishment, persists, notwithstanding the evidence, to deny the charge. In former times it was the practice, in cases of heinous offences, for the public accuser to pray that the accused *should be put to the rack*, or to the *severer examination* (*scherper examen*), as it was termed. The disputes concerning the utility and justice of this measure are endless, as well as on the particular cases in which it ought to be applied.⁽¹⁾ But it is now become unnecessary to agitate this question, since torture has been expressly abolished;* and, therefore, in no case whatever, may a judge make use of any means, attended with pain or suffering, or the threat or apprehension of it to the ac-

Abolition
of torture.

(1) J. Grevii Tribunal Reformatum. Leyser, Medit. ad Pand. Tom. 10 Spec. 630, 631, 632, 638, 639, and 640. D. Jonktys, over de Pijnbank. Voorda, Verhand. 1 Hoofdst. S. 14, and many others.

* For Observations on the abuses which formerly prevailed in the application of the Torture under the old Criminal Law of Europe, see Criminal Report, p. 35 and 36 et seqq. in Notes.—T.

Abolition
of torture.

cused, in order to obtain his confession, in case he persist in his denial. This, however, does not hinder a judge, when the accused is brought before him, either by a writ of personal apprehension or by personal citation, and he refuses to answer upon interrogatories, and after being admonished by the judge of his duty to answer, persists in his refusal, to compel him thereto by such means as he shall think proper.⁽¹⁾ *

SECT. II.

Sentence
on conviction.

It would however be very prejudicial to the public interests, if every accused person against whom there is clear proof, and whose denial has no other ground than obstinacy, were to be received in ordinary process.⁽²⁾ Instead therefore

(1) Reglem. 10 Oct. 1798. Art. 1.

(2) The proceedings in ordinary process occasion—First, very heavy expenses, as well to the country, when the attorney-general is accuser, as to the sheriff and bailiffs.—Secondly, a very pernicious tediousness, principally because the accused may appeal to a higher court.—Thirdly, to people of bad principles, who listen with avidity to the pleadings, too many opportunities are given for learning chicanery, and subterfuges, of which they avail themselves to the prejudice of justice, or being themselves accused. No ordinary prosecution ought therefore to be instituted, except in those few cases which will be pointed out in the following chapter.

* In France, the practice is to confine the party *au secret*, and on bread and water, if he refuse to answer the interrogatories.—See note p. 522, *supra*, and also Criminal Report, p. 13.—T.

of the torture, another course must be followed by means of which cases of this kind may be disposed of, without the tedious forms of ordinary process; this is termed passing sentence *on conviction*; that is, conviction on full proof of the fact *aliunde*, although the accused does not confess the charge. If therefore the judge finds that the prisoner cannot be brought to confess the charge against him, but that the informations are of such a nature, that by these it appears fully proved that the prisoner has committed the crime;⁽¹⁾ in such case the judge authorizes the public accuser, on these proofs, to pray judgment in extraordinary process, and to file his criminal claim and demand.⁽²⁾

Sentence
on conviction.

SECT. III.

The form of proceeding in this case requires,

1. That immediate notice of this judicial appointment be given, not only to the public accuser, but also to the prisoner.

How to
proceed
therein.

2. That the prisoner at the same time be admitted to choose one or more counsel, to make a summary defence for him, and without form of process, as he may be advised. In case he is

(1) The law speaks only of prisoners; but there is no reason why it should not apply to such persons as have received a personal citation; of which we have several examples in practice.

(2) Reglem. Art. 8.

How to
proceed
therein.

unable to fee counsel, the court assigns him one or more for this purpose.⁽¹⁾

3. That free access be immediately granted to the counsel chosen by the prisoner, or assigned by the court.⁽²⁾

4. That within eight days, the public accuser file in court his criminal claim and demand, with the vouchers.

5. That, at the same time, copies of this claim and demand, and of the proofs, be handed over to the prisoner or his counsel.⁽³⁾

6. That the costs of these copies be paid by the prisoner; or, if he is unable to pay them, they are charged to the head of judicial expences.⁽⁴⁾

7th. That the prisoner's counsel be at liberty to request sight of the original vouchers, and apply to the court for this purpose.⁽⁵⁾

8. That the prisoner, or some one on his behalf, have leave to cross examine the witnesses against him, or some of them.

9. That the prisoner be at liberty to deliver to the judge all such evidence as he may be able to obtain, in his defence, and add thereto a deduction or memorial of law.

10. That the public accuser also be at liberty

(1) Reglem. Art. 9.

(2) Reglem. Art. 10.

(3) Reglem. Art. 11.

(4) Reglem. Art. 12.

(5) Reglem. Art. 13.

to annex to his claim, and demand a memorial in its support.⁽¹⁾

How to
proceed
therein.

11. That the time for making the defence be fixed by the judge, according to the intricacy and other circumstances of the case, never shorter than fourteen days, nor longer than six weeks, unless for very cogent reasons.⁽²⁾

12. That the term assigned to the prisoner for his defence being expired, the judge, whether the prisoner has made his defence or not, do as speedily as possible investigate the case, *and pass a definitive sentence*, such as he shall think meet and agreeable to justice, and without appeal.⁽³⁾

SECT. IV.

Besides the two cases above mentioned, *either* that the prisoner has confessed the charge, or that he has been convicted on full proof, there is yet a third case, namely, that the innocence of the prisoner does not quite clearly appear, but yet the proofs against him, are not sufficiently strong to produce conviction, whilst, at the same time, there is no probability of obtaining, at present, or within a short time, further proof, which however may be expected thereafter.

Release
under
*Hand-
tasting.*

This state of things is termed a *non liquet*,

(1) Reglem. Art. 14.

(2) Reglem. Art. 15.

(3) Reglem. Art. 16.

Release
under
*Hand-
tasting*.

that is, the judge is not quite satisfied, either of the guilt or of the innocence of the prisoner.

In this case, he releases him under *hand tasting*,* and promise to appear again at all times when summoned *sub pœna confessi et convicti*, that is, on pain if he make default of being held guilty.⁽¹⁾

(1) Crim. Ordonn. Art. 53. Crim. Stijl. Art. 44. en aldaar Prof. Voorda, in zijne Anteeck. Reglem. 10 Oct. 1798. Art. 6.

* *i. e.* taking the president by the hand, *pro tribunale*, and which is equivalent to the *stipulatio judicio sisti*.

A remarkable circumstance occurred at Demerary, a short time before the Translator's arrival there, of a white man, who would have been acquitted if brought to trial in England, having been hanged under this article.—T.

CHAPTER IV.

Of Ordinary Criminal Process.

SECT. I.

SOMETIMES, after the hearing on articles, and confrontation has taken place, the *extraordinary* is changed into *ordinary process*. Formerly this was very frequently the case, because the *confession* of the party was held necessary to passing sentence on him.⁽¹⁾

When ordinary process has place.

Now the ordinary process is very rare, since without confession we may, upon full proof *aliunde*, proceed to do justice on *conviction*, even to passing sentence of death. The cases in which ordinary process is yet practised, are these two :—

1. When the prisoner has not only denied the charge, but it is besides doubtful whether the proofs laid over by the public accuser, are sufficient or not to convict the prisoner.

2. When the prisoner acknowledges the act itself, but denies the imputed criminality, and the question, whether the act be criminal or not, may be matter of just dispute;⁽²⁾ although the

(1) *Costumen van Rhijnland*. Art. Voorda, Verhand. 1 Hoofdst. S. 33 et 34.

(2) *Reglem.* 10 Oct. 1798. Art. 7.

When ordinary process has place.

judge may have permitted the public accuser to pray sentence upon conviction in *extraordinary process*, this however does not prevent the judge from rescinding this order, and receiving the prisoner in *ordinary process*, if after examining his defence, he finds it of sufficient weight to induce him so to do.⁽¹⁾

SECT. II.

Assistance of minors.

In extraordinary process, neither minors, nor married women, whether apprehended or cited to appear in person, are entitled to any assistance.⁽²⁾ This rule is however subject to an exception in *ordinary* criminal proceedings, whether commenced in *ordinario modo*, or afterwards changed into it, for in those cases, minors may be assisted by their parents and guardians, and married women by their husbands.⁽³⁾

SECT. III.

Form of ordinary process.

With respect to the form of ordinary criminal proceedings, there is little special to remark, since they are framed and conducted for the most part as those in a civil process; it will be

(1) Reglem. Art. 17.

(2) See pag. 106 et 402, *supra*.

(3) Supplem. nostrum ad Voetii, Pand tit. de Judic. S. 12, where a remarkable decision is mentioned, relating to this point, by the Schepenen of Rotterdam, confirmed by sentences of the Court and the High Council.

sufficient, therefore, to make the following observations :

Form of
ordinary
process.

1. They are commenced without previous citation (the prisoner being already in process), merely by the filing of the claim, on the part of the attorney-general or bailiff, on the criminal roll.

2. In these ordinary processes, the terms ought to be short and strictly followed. In the Court of Holland the terms are from fourteen to fourteen days, and peremptory.⁽¹⁾

3. The prisoner must, so soon as the claim is filed, request by his attorney at the roll a copy of the previous examinations and confrontations, as also of the vouchers in the claim and demand mentioned. To demand copies of the further vouchers, and proofs is unnecessary, for the terms for exchanging vouchers, as in civil cases, serves for this purpose.⁽²⁾

4. The defence of the accused consists mostly in a direct contradiction of the criminal claim, or, as it is termed, a *contrary conclusion*. If he thinks he can clearly shew that no corporal punishment is attached to the offence with which he is charged, he is at liberty by his answer to make a request of *provisional release* under *hand-tasting*.⁽³⁾ Such causes, after joining issue and

(1) Reglem. 9 Maart 1728. Art. 2.

(2) Judic. Pract. 4. B. 5 Hoofdst. S. 13. pag. 238.

(3) Bort, Tract. van Crimin. Zaaken. Tit. 8.

Form of
ordinary
process.

exchange of vouchers, are verbally pleaded. In the Court of Holland, however, they are first treated as written causes, and a written report or inquest made thereon ; but nevertheless, they are afterwards decided upon on verbal pleadings.⁽¹⁾

(1) See pag. 470, *supra*.

CHAPTER V.

Of Sentences, Executions, and Appeals in Criminal Cases.

SECT. I.

ALL criminal sentences, passed upon *confession* or *conviction* must contain, Criminal sentences.

1. A statement of the crime committed by the prisoner, on pain of nullity.⁽¹⁾

2. A precise expression of the punishment to be inflicted.

3. A declaration as to the payment of the costs of the imprisonment and prosecution. In these the prisoner is almost always condemned, although the punishment affixed by the sentence may differ very widely from that prayed in the criminal claim.

Sentences in ordinary process are regulated according to the pleas filed, as in civil cases.

The pronunciation of all criminal sentences is done in the presence of the prisoner, or of the party cited to appear in person, who for this purpose must appear personally at the roll.⁽²⁾ If the sentence admits of appeal, and the party wishes

(1) Staatsreg. van 1805. Art. 72.

(2) Merula, Manier van Proced. Lib. 4. Tit. 89. Cap. 1. in not.

544 OF SENTENCES, EXECUTIONS, APPEALS, &c.

Criminal sentences.

to avail himself of this remedy, he must note his appeal on the roll immediately before it is closed.⁽¹⁾

SECT. II.

Sentence against parties who do not appear.

If the accused does not appear, or has fled from justice, the proceedings against him are consequently by default. The sentence generally contains a decree of banishment, being for the most part intended as a punishment for his contumacy in not appearing to clear himself from the evidence and suspicions, on the strength of which the first decree or warrant was issued against him. If he afterwards falls into the hands of justice, the cause is proceeded in by examinations on articles in extraordinary process, and the punishment for the offence awarded by a fresh sentence.⁽²⁾

From this we see how ill advised, and of what little force, it is, in a sentence by default, to condemn the party to death, or any other punishment, if he return, without leave, from banishment.

SECT. III.

Execution of criminal sentences.

So soon as the criminal sentence is pro-

(1) Merula, d. l. Lib. 4. Tit. 3. Cap. 2. in not. Judic. Pract. 4 B. 5 Hoofdst. S. 13. pag. 239.

(2) Crimin. Stijl. Art. 56. en volgg. en aldaar de Aanteek van Prof. Voorda.

nounced, if no appeal lies, execution follows immediately.⁽¹⁾ This rule, however, is subject to an exception, when the party condemned is a pregnant woman, on whom the sentence cannot be executed till she is delivered.⁽²⁾ When the punishment is of a capital nature, the party condemned is previously prepared for death by some minister of the church,⁽³⁾ and according to the present practice (and very properly) by those of his own persuasion.

Execution
of criminal
sentences.

The execution takes place in public, as an example to deter others.⁽⁴⁾

When the judge, after passing a criminal sentence, finds that it cannot be executed on the person of the party, has he, it may be asked, the power to alter it of his own authority? Certainly not, for all sentences once pronounced are unalterable.⁽⁵⁾ But he may apply to the sovereign to authorise him to make such alteration.⁽⁶⁾

(1) L. 18. C. de poen.

(2) L. 3. ff. de poen. L. 1^a. ff. de Stat. hom.

(3) Crimin. Stijl. Art. 47.

(4) G. Van Hasselt. Dissert. de Carnifice. (Traj. 1773).

(5) L. 14. L. 55. L. 62. ff. de re judic. L. 1. S. ult. in fin. ff. de quæstion. L. 1. C. Sent. resc. non posse.

(6) D. L. 1. de quæst.—The Court did so in the case of a person condemned to be whipped, who, during the time when the sentence was read, had such strong convulsions, that he was unable to suffer the public punishment on the scaffold.—Resol. Holl. 20 July 1787. G. P. B. 9. D. fol. 723. The Committee of

SECT. IV.

The general rule regulating appeals in criminal cases, respecting which there were formerly such endless disputes ⁽¹⁾ is,

Appeals in
criminal
cases.

First. That the Court of Holland can grant no appeal on the application of any person against whom the proceedings have been conducted in extraordinary process, and sentence passed on his own confession; but these sentences are executed without permitting any appeal or proceedings in the nature of appeal, as by *reformation or otherwise*.⁽²⁾

The exceptions to this rule may be reduced to the three following:

1. When there is no confession, or at least, not a sufficient confession.

2. When there is a manifest nullity in the proceedings.

Justice of the city of Amsterdam acted somewhat differently in a similar case, with regard to one Hendrick Jansen, who being condemned to be beheaded, but by his resistance rendering the execution impossible, was by alteration of that sentence condemned to be hanged.—B. A. Van Houten, *Crim. Proces. tegen. H. Jansen.* pag. 219. et seqq. Although in our opinion, this conduct of the Committee is very defensible in law, yet it belongs to those things *quæ non sunt producenda ad consequentias*.

(1) V. D. Wall, *Handvesten van Dordrecht.* 2. D. pag. 1331. Seqq. Voorda, *Aanteek. op den Crim. Stijl.* Art. 64.

(2) *Resol. Holl.* 10 Sept. 1591. G. P. B. fol. 1062. Van Alphen, *papcg.* 1 D. pag. 307.

3. When the punishment is evidently too severe, and out of all proportion to the crime.⁽¹⁾

Appeals in
criminal
cases.

Secondly. That from sentences upon *conviction*, like those upon *confession*, no appeal nor any proceeding in the nature of appeal is permitted.⁽²⁾

Thirdly. From sentences in ordinary process, by the inferior or high courts, an appeal lies to the Court of Holland, and from sentences of the Court of Holland, sitting as a court of first instance, to the High National Court.⁽³⁾

With respect to the revising of a criminal sentence, passed in ordinary process, it is clear that it is open to the party to have this done at his *own expense*. In criminal cases no revision is granted *pro deo*, or in *forma pauperis*, unless the party has been condemned to corporal punishment, and has had one-fourth of the votes of the court in his favour.⁽⁴⁾

(1) Report of the High Council on the Remonstrances of the Court in the Cause of A. V. D. Mieden, L.L.D. pag. 19. Jud. Pract. 2 B. 24 H. S. 4. pag. 328 et 329.

(2) Reglem. 10 Octob. 1798. Art. 16.

(3) Instr. van't Nation. Gerechtshof. Art. 49. Staatsreg. van 1805. Art. 84.

(4) Reglem. op de Revisiën van 14 Maart, 1796. Art. 2.

INSTITUTES
OF THE
LAWS OF HOLLAND.

BOOK IV.

ON THE LAW MERCHANT.

CHAPTER I.

*On Commerce in General, and that of Holland
in particular.*

SECT. I.

THE entire existence and welfare, as well as the fame of the United Provinces, depends upon its shipping, and foreign trade, and commerce. This used to be the language of the States-General.⁽¹⁾ Although, therefore, the law

Introduc-
tion.

(1) Plac. Gener. 8 Feb. 1645. G. P. B. 1 D. Col. 984. It is also the language of Grotius in his Introduction to the Laws of Holland, 3 B. 20 D. S. 1. "The welfare of Holland depends principally upon its foreign trade."

Introduc-
tion.

relating to this subject might very easily have been introduced in the *first book*, where we treated of contracts and other obligations, we have thought it better to dedicate a special book to this subject. We have been induced to adopt this order for two reasons :

1. The particular importance of the subject on which we are about to treat, and which would not admit of our touching on it before, as it seemed to us to require a special and separate consideration.

2. That although in the handling of those questions which are specially termed *mercantile*, one great mistake is, that we too seldom reduce them to first and fundamental principles by the just application of which the most difficult and knotty points are frequently resolved with the greatest ease and certainty :⁽¹⁾ yet, on the other hand, it must be confessed, that questions relating to commerce require to be viewed not only with the eye of a sound lawyer, but also with that of a merchant who has made himself familiar with the law of commerce,—all which considerations are better kept in view by a separate inquiry.

SECT. II.

Origin of
commerce.

The origin of commerce is nearly coeval with

(1) See my preface to the *Treatise of Pothier on Contracts and Obligations*, 1 vol.

that of the right of property.⁽¹⁾ Since that which is in the possession of one person was frequently an article of necessity with another : hence arose the contract of barter or exchange,⁽²⁾ of which we find traces even among the most uncivilized people ; but the more civilized and populous the nations were, the more general and extensive this traffic became. However, this exchange was not unfrequently subject to difficulties, as when one party had no need of the articles of the other. This made it necessary to constitute some particular article or universal medium of exchange for all others, which, by its general adoption, became an article of universal necessity.

Origin of
commerce.

The metals were chosen for this purpose, which were exchanged first in the rough, as they were extracted from the ore, afterwards in pieces of a certain weight, and on which, to prevent fraud, a stamp or certain characters were impressed. To these pieces the name of *money* was given, and the exchanging of this money for other articles was termed *purchase and sale*, instead of barter.⁽³⁾

The first people who appear to have practised

(1) Puffendorf de T. N. et G. Lib. 5. C. 1.

(2) Puffendorf, d. l. C. 5.

(3) Huet, Histoire du Commerce et de la Navigation des Anciens, Chap. 1-6.

Origin of
commerce.

navigation were the *Egyptians* and *Phœnicians*.⁽¹⁾ By this means they were enabled to extend their commerce to all the then known parts of the globe. In the most ancient histories of the *Indians, Chinese, Persians, Arabians, and Æthiopians, &c.*, we find mention made of this traffic by sea.⁽²⁾ Among the ancient nations, the *Carthaginians, the Greeks, and, above all, the Rhodians*,⁽³⁾ merit the first place in this respect. The navigation of the *Romans*, before the war with *Carthage*, appears to have been of little consequence ; but afterwards, as the dominion of that republic became extended, it gradually increased.⁽⁴⁾

SECT. III.

Commerce
of Hol-
land.

The commerce of this country demands our most special consideration : the history of it may be divided into three periods :

1. That before and during the dominion of the earls until the extinction of that government under Philip II.

2. From that period until the treaty of Westphalia.

3. From that treaty to the present time.

(1) Huet, d. l. Chap. 7.

(2) Huet, d. l. Chap. 9-14.

(3) Huet, d. l. Chap. 15-19.

(4) Huet, d. l. Chap. 21. et suiv.

SECT. IV.

First Period.—Although the commerce of the Batavians was of trifling import, yet it established itself very early in the Netherlands.⁽¹⁾ The first branch of commerce and navigation appears to have consisted of the fisheries, particularly of cod and herrings;⁽²⁾ and, in fact, the mode of salting and curing these was discovered by a native of the Netherlands, (*William Beakelszoon*) who was born at *Biervliet*.⁽³⁾ The exporting of salted and dried fish to other countries, gave occasion to the importing in return of other commodities in exchange, as articles of use, but not the produce of our own country. This gave rise to the trade with the *north*, from whence we imported grain and timber. From time to time our commerce extended itself to all countries and to all commodities.⁽⁴⁾ The town of *Dordrecht* was very early known⁽⁵⁾ as a place of trade. At *Amsterdam*, even before the middle of the sixteenth century, there was an established

First
period.

(1) Engelberts, *aloude Staat der Nederlanden*, 2 D. pag. 38 et 4 D. pag. 249.

(2) *Richesse de la Holl.* Tom. 1. pag. 19. et suiv.

(3) *Beschrijving der Haring visscherije*, Amst. 1791. in 4to.

(4) *Richesse de la Holl.* Tom. 1. pag. 23 et suiv.

(5) V. D. Wall, *Handvesten van Dordrecht*. 1 D. pag. 56, 83, 108, 132, 140, and elsewhere.

First
period.

trade.⁽¹⁾ Other towns also gradually acquired a foreign trade.⁽²⁾

The manufactures also of this country, to which the industrious Hollander has in many places applied himself, have greatly contributed to our foreign trade, such as cordage, sail-cloth, casks, linen, and woollen cloths, hats, and the like. From the manufacture here of these articles, arose chiefly the trade between this country and England and France.⁽³⁾

SECT V.

To the
treaty of
Westpha-
lia.

Second Period. From the end of the government of the Earls to the treaty concluded at *Munster* in 1698. After these provinces became, by the *Union of Utrecht*, mutually bound to each other, and the yoke of the earls had been thrown off, our commerce increased rapidly; and although it had before that period been confined to Europe, it now extended itself to the other quarters of the globe. At this period, in the year 1602, was established the *East India Company*, and in 1621 the *West India Company*.⁽⁴⁾ The commerce also up the

(1) Wagenaar, Beschr. van Amsterdam, 9 Stuk. pag. 379. en volg.

(2) Richesse de la Hollande, Tom. 1. pag. 36.

(3) Richesse, &c. Tom. 1. pag. 39-42.

(4) Wagenaar, Vaderl. Hist. 9 Deel. blad. 147. en volgg. et 10 D. bl. 306.

Mediterranean became of so much importance, that in the year 1625 a Levant Company was formed,⁽¹⁾ for the protection of which several regulations have since been made.⁽²⁾ The trade to *Iceland*, and the *Greenland* Whale Fishery, and that of *Davies' Straits*, owe their origin to this period.⁽³⁾ The demand also for articles, the manufacture of Holland, increased remarkably, and was extended to a variety of new articles, as for instance, whalebone, refined sugars, the cutting of diamonds, &c.⁽⁴⁾

To the
treaty of
Westpha-
lia.

That the trade with *England*, *France*, *Spain*, *Portugal*, and *Germany*, had greatly increased, appears from the several commercial treaties concluded with those powers during this period;⁽⁵⁾ but it is chiefly to the carrying trade that the navigation of Holland owes its prosperity.⁽⁶⁾

The institution of *Admiralty Boards* in the year 1597⁽⁷⁾ deserves also to be particularly noticed. It is not under these circumstances to be wondered at, that to this period is to be

(1) Wagenaar, Beschr. van Amsterdam, 9 Stuk. pag. 414-419.

(2) Register op't Gr. Pl. Boek. Art. Levantschenhandel en Levantvaarders.

(3) Richesse, &c. Tom. 1. pag. 67-71.

(4) Richesse, &c. Tom. 1. pag. 71-73.

(5) Richesse, &c. Tom. 1. pag. 73-78.

(6) Richesse, &c. Tom. 1. pag. 78-80.

(7) Instructie voor de Admiraliteits-Raaden en Bedienden Van 13 Aug. 1597. in 't G. P. B. 2 D. Col. 1530.

To the
treaty of
Westphalia.

ascribed the origin of insurance companies,⁽¹⁾ the establishment of the bank at Amsterdam in 1609,⁽²⁾ and the concluding of different treaties with foreign states,⁽³⁾ so that this period may be considered as by far the most prosperous for the commerce of Holland.

SECT. VI.

From the
peace of
Westphalia to the
present
time.

Third Period from the Peace of Westphalia to our time. In this period also we have to remark a very considerable increase in the commerce of these states in the East Indies,⁽⁴⁾ where we possessed Java, the Molucca Islands, and the Cape of Good Hope; and in those places where we had established factories, and where we enjoyed an exclusive trade in spices, our commerce was splendid.⁽⁵⁾ The great and small fisheries were likewise considerably extended.⁽⁶⁾

The establishment of the *Surinam* Society, the capture of that colony, the trade to *Berbice*, *Essequebo*, *Demerara*, and *Curacoa* formed so many branches of our West Indian commerce.⁽⁷⁾

The commercial transactions effected also

(1) Richesse, &c. Tom. 1. pag. 109. et suiv.

(2) Wagenaar, Beschr. van Amsterdam, 9 Stuk. bl. 430 en volgg.

(3) Richesse, &c. Tom. 1. pag. 158-168.

(4) Vredes—Tractaat van Munster van 1648. Art. 5.

(5) Richesse, &c. Tom. 1 pag. 214 et suiv.

(6) Richesse, &c. Tom. 1. pag. 253-279.

(7) Richesse, &c. Tom. 1. pag. 279-344.

upon commissions from foreign merchants in almost all parts of the globe, have likewise proved a very considerable source of profit. We may lastly here add a species of trade, which although not very ancient, has in later times become very general and lucrative, namely, the dealing in national and foreign funds or securities.⁽¹⁾

From the peace of Westphalia to the present time.

SECT. VII.

Such then at one time was the flourishing state of the commerce of this country.

Increase and decline of the commerce of Holland.

Its advantageous maritime position at the mouth of a great river, and placed between the northern and the southern parts of *Europe*, of which it forms as it were the middle point; the necessity of seeking from other countries the common articles of consumption, the productions of this country consisting almost solely in butter and cheese; the domestic frugality of our forefathers; their disposition to be content with a small profit; their good faith in the fulfilment of their obligations; the little applica-

(1) Richesse, &c. Tom. 1 pag. 363 et suiv. When this trade is carried on as a *bona fide* and real transaction, there appears no reason for discontinuing it; but when the stock itself is not really sold or transferred, but it is a mere speculation in its rise or fall within a certain time to take the value of the difference, it is, in our opinion, a pest of commerce, and has so much resemblance to the ridiculous stock-jobbing of the year 1720, (Wagenaar, Vaderl. Hist. 18. D. pag. 216, et seqq.), that its abolition is equally to be desired.

Increase
and de-
cline of the
commerce
of Hol-
land.

tion of the other states of Europe to trade, manufactures, and navigation; the refuge and protection afforded by this country to foreign merchants, who sought there to enjoy a greater portion of civil and religious liberty; the respect paid to the mercantile character, and wise system of legislation with respect to commerce, especially with regard to the duties on imports and exports, and the distribution of pure and impartial justice; and lastly, the constant abundance of the precious metals in the shape of coin or bullion: these are the causes which raised the commerce of Holland to its grandeur and magnificence.⁽¹⁾

But with this as with all sublunary affairs, it happened that having attained a certain height it began to decline.⁽²⁾ To what a miserable state have our manufactures been depressed? Do we not now witness foreign vessels conveying under their own flag, those articles which formerly were transported exclusively under ours?

What are the causes of this declension?

Formerly commerce was considered by the⁽³⁾ other nations of Europe, as a matter of trifling

(1) Richesse, &c. Tom. Ch. 6 and 7. pag. 375. et suiv. Pestel, Comment. de Republ. Bat. Tom. 1. S. 149. pag. 488-490.

(2) C. Zillezen Neërlands Opkomst, Bloci and Welvaart. p. 88.

(3) Richesse de la Hollande, Tom. 2. Chap. 8. pag. 1-235. A. Rogge, in his Treatise hereafter quoted, pag. 202-243.

import, but at the period of this change, actuated by jealousy of our commercial prosperity, they used every endeavour to partake of it, and even to oppress ours by heavy duties, which had the effect of diminishing our trade in proportion as it increased theirs. The increase also from time to time of our internal taxation, had necessarily the effect of increasing the price of provisions, and with it the price of manufactures and labour; and in those countries which produced the raw material manufactories were erected, which were worked at much less cost. The imprudence also of the Hollanders, in employing foreign seamen instead of natives, and in engaging foreigners into their manufactories, and houses of trade; the continual wars in which our country has been engaged; the costs of so extensive a naval and military force as that we have been obliged to maintain, and the interruption to navigation occasioned by these wars, could not but accelerate this decline of our foreign trade. The practice of smuggling also, in which some indulged; the excessive charges made in commission transactions; the continual decline of honesty, and good faith in commerce; the unlimited credit given to foreigners; the immoderate luxury, and expensive manner of living of many of our merchants; and the frequent and unpunished bankruptcies, whereby the ancient Batavian good faith was

Increase
and de-
cline of the
commerce
of Hol-
land.

Increase
and de-
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commerce
of Hol-
land.

tarnished, may be also numbered among the intrinsic causes of this decline. How much also to these causes, have not the misfortunes which our country has suffered for the last ten or twelve years contributed, whereby the country has been brought to such a state, that we may apply to it the words of an able writer, who says,⁽¹⁾ “No nation is happy, when the few abounding in wealth, abandon themselves to luxury; and the many, and by far the most useful part of the community, suffer under a want of the common necessaries of life. No; the true policy of a state consists in rendering the whole body of the people happy.”

SECT. VIII.

Means of
reviving
our com-
merce.

The question how our commerce and navigation may be revived, is of the first importance.⁽²⁾

(1) H. H. Van den Heuvel in his Treatise hereafter quoted, pag. 42.

(2) With respect to this question, see the Project for the Improvement of Commerce, by His Highness William IV. on the 27th August, 1751, in the Assembly of the States General, in the Annals of the Netherlands of October 1751. pag. 894-909. The Answers of H. H. Van den Heuvel, A. Rogge, and C. Zillesen, given on the questions proposed on the part of the Dutch Society of Sciences at Haarlem: viz. What are the grounds of the commerce of Holland, its increase and prosperity? What causes and accidents have hitherto exposed it to change and decline? What means are the readiest and best calculated to maintain it in its present state, to promote its advancement, and to raise it to the highest degree of prosperity? The answers

The means are different as far as regards our internal, or our external trade and navigation. The increase of our internal commerce, must certainly be looked to as the greatest source of the two others. To render this flourishing it is necessary to encourage agriculture, and to bring into a state of cultivation our numerous tracts of waste land.

Means of
reviving
our com-
merce.

The fisheries, which formerly yielded so many millions, ought also to be promoted by all possible means. Next in importance is the encouraging in our own and other countries, the use of our own manufactures, and the checking, by every means in our power, the establishment of foreign manufactories.⁽¹⁾ For the extension of our foreign commerce and navigation, we ought to prevent as much as possible the withdrawing of the precious metals from our own country, and for this purpose to avoid all concern in mercantile companies; to make no advances to foreign merchants, but on goods previously shipped for this country; to assist no measures

to these questions are to be found in the 16th Vol. of the Treatises of the aforesaid Society. Richesse, &c. Tom. 2. Ch. 9. pag. 236 et suiv. H. H. Van den Heuvel's Treatise on the Necessity of promoting Public Industry, and the Means fit for that Purpose, as it relates to our Country (Utr. 1780). C. Zillesen Philosophical Inquiry into the Rise and Prosperity of Holland (Amstr. 1796).

(1) See this subject treated at large in the Answer of V. D. Heuvel. pag. 54-104.

Means of
reviving
our com-
merce.

for the improvement of foreign colonies, either by the making or negotiating of loans for this purpose.

The return to frugality and good faith, to punish bad faith and fraudulent bankruptcies, and to promote speedy justice, might do much towards accomplishing this object. Finally, the establishment of a lasting peace, whereby an end may be put to this destructive war, is indispensably necessary to the hope of any revival of our decayed commerce and navigation; and we close this part of our subject, with the heartfelt wish, that our present monarchical government, which, certainly, upon the first principles of state policy, is to be preferred to those⁽¹⁾ changeable forms of government, which in the late years have so miserably unsettled every thing, may ere long be followed by the return of peace, and the revival of commerce and navigation.

SECT. IX.

Trade of
Amsterdam.

Having thus taken a view of commerce in general, we must not omit to notice that of *Amsterdam* in particular.⁽²⁾

The commerce of this city may be classed under three distinct heads.

(1) Montesquieu, l'Esprit des Loix. Liv. 5. Ch. 10-12.

(2) Compare on this subject Wagenaar, Beschr. v. Amsterdam, 9 St. as also the work of Le Long, Koophandel, v. Amsterdam, 10th or last edition of 1801, in 4 vols. in 8vo.

1. For the sale of articles either prepared, brought in, or used in this city, there are public markets held daily, weekly, or at other fixed periods,⁽¹⁾ and a number of market places.⁽²⁾ There is also a variety of guilds or companies of different trades;⁽³⁾ these are not so extensive as formerly, and do not enjoy the same privileges; yet their by-laws and regulations are still favoured and protected, so far as they are not found contrary to good policy.

Trade of
Amsterdam.

2. The next branch consists in the internal and foreign trade,⁽⁴⁾ for the carrying on of which there were, at a very early period, *ferries* established in most of the places, situated on the sea, or rivers, or canals, where vessels load or discharge at certain fixed periods.⁽⁵⁾

3. In so far as regards the last branch or the foreign trade of *Amsterdam*, its origin may be fixed at about the middle of the fourteenth century, and before the closing of that and during the fifteenth and sixteenth centuries, this trade increased to such a degree⁽⁶⁾ that it extended itself to all the then known parts of

(1) Wagenaar, d. l. pag. 3-11.

(2) Wagenaar, d. l. pag. 11-64.

(3) Wagenaar, d. l. pag. 64-224.

(4) Le Long, 3 D. 19 Kap. pag. 1-46.

(5) Wagenaar, d. l. pag. 280-368.

(6) Wagenaar, d. l. pag. 379-387.

Trade of
Amsterdam.

the globe.⁽¹⁾ For the promotion of this commerce, there is, at *Amsterdam*, an exchange, where the merchants first assembled on the 1st of August, 1613 :⁽²⁾—three public weighing places for such goods as are sold by weight :⁽³⁾—and in the year 1609 a bank was established, on the model of those of the other mercantile states of Europe. It is also the general banker of all those who wish to trust their funds on the security of the city. There, also, all persons could exchange their coin, the bank being content with the smallest possible profit. The value of all bills of exchange, drawn or negotiated here, from six hundred guilders and upwards, was to be paid into the bank ; but the rise in the value of the bank *stock* occasioned afterwards many bills to be drawn payable in cash. No one can draw upon the bank for a sum exceeding his quantity of stock, and no one's funds therein can be arrested.⁽⁴⁾ The credit of the bank security increased so rapidly that its stock soon became above *par*. This was termed the *agio* of the bank stock. The funds which any one

(1) Wagenaar, d. l. pag. 387-425. Le Long, 3 D. 20-27. Kap. et 4 D. 28-33. Kap.

(2) Wagenaar, 7 Stuk, pag. 89-99. Le Long, 1 D. pag. 64-68.

(3) Wagenaar, d. l. pag. 104-110. Le Long, 1 D. 9 Kap.

(4) See *supra* pag. 433.

has in the bank are disposed of by transfers, checks, or orders, on the commissioners of the bank, and they must be brought in either by the party himself who signs them, or by his attorney.⁽¹⁾ Money.

Brokers, to the number of five hundred, as well Jews as Christians, are appointed; and, besides these, there are many who act as brokers without being regularly admitted; but it is not permitted to brokers to deal or carry on trade in those articles in which they act as brokers, but only for their employer, to whom they are bound, so soon as he desires it, to account for all articles purchased or sold by them, either at public auction or by private contract. For this purpose, they are bound to keep a proper register of all these transactions, to serve as proof in case of dispute.⁽²⁾

Lastly, we have also in this city, besides the brokers above-mentioned, a variety of persons employed in navigation and commerce, such as *commission agents, for freight or cargo, shippers, weighers, corn-porters, corn-meters, lightermen, watermen, sledge-men, ship-wrights,*

(1) Wagenaar, 9 Stuk, pag. 530-441. Le Long, 1 D. 5 Kap. pag. 150-219.

(2) Wagenaar, 9 Stuk, pag. 188-194. Le Long, 1 D. 2 Kap. p. 68-115.

Trade. • *mast-makers, pilots, waggoners, carriers, and packers, &c.*⁽¹⁾

SECT. X.

Before we close this chapter, we think it necessary to notice shortly some special matters relating to trade.⁽²⁾

First. Trade, that is, that kind of traffic which consists in the purchasing of any articles, with the view to resell them at a profit, is open to every member of the state to exercise, so far as the laws do not prescribe any limits thereto. In carrying on trade in *wholesale*, i. e. in the selling of a considerable quantity at a time of those articles which are sold by number, weight, or measure, this general liberty is hardly subject to any restraint; but in trade by *retail*, this liberty is subjected, by many local laws, to a variety of restrictions and regulations, in order to prevent the abuse thereof which may be committed by one inhabitant to the prejudice of the others.⁽³⁾

(1) Wagenaar, d. l. pag. 447-465.

(2) See also G. T. Von Martens, *Grundriss des Handel-rechts*, 1 Busch. Abschn. 1-6.

(3) See with regard to this subject, the by-laws and corporation laws in many towns of this country; which laws, in so far as they may be considered as laws founded on good policy, are still, with great propriety, maintained in full force.

It is on this account that it is, among other Trade. things, forbidden to walk about the streets with articles of merchandize for sale, which is termed hawking or huckstering.⁽¹⁾

The title of merchant is held in such repute, that it is even no disparagement to nobility.⁽²⁾ The liberty of trade is equally open to all persons, Jews as well as Christians, females as well as males. However, in the case of married women, they are not at liberty to act as public traders but with the knowledge or privity of their husbands, and minors only after they have been tacitly⁽³⁾ emancipated from the parental power, or have a *venia ætatis*.⁽⁴⁾

Secondly. Trade is carried on either by exchanging one article of commerce for another, which is commonly called *barter*, or by purchase and sale.⁽⁵⁾ This is done either for *ready money* or upon *credit*. If the sale is for *ready money*, and payment is not made, the seller may reclaim the goods within a short time, generally six weeks.⁽⁶⁾ The payment is either made,

1. In *cash* or *per banco*, that is, by the transfer of so much stock.⁽⁷⁾

(1) Plac. Holl. 12 April 1749. Publ. 12 Aug. 1802.

(2) Leyser, Med. ad Pand. Tom. 10. Spec. 670. Med. 22.

(3) See above, page 84.

(4) See above, page 95.

(5) See above, page 224-236.

(6) Vid. supra, p. 120 et 235.

(7) Vid. supra, p. 565.

Trade.

2. By *bill*, that is, by the endorsing of an accepted bill of exchange to the creditor, who has then the power either to endorse it over to a third person, or to demand payment of the acceptor, when due.

If not paid, the bill is protested, and the holder has his remedy against the acceptor, the drawer, and the other indorsers.⁽¹⁾

3. By *cash acquittances*, or orders on the bank; but the party who gives these is not liable in case of non-payment, if payment has not been demanded within ten days; and if this acquittance or receipt be not signed by the person who gave it in payment, but by another, in such case payment must be demanded within three days after it has been taken in payment.⁽²⁾

4. By *set off (rescontre)*, that is, by a counter-claim of the other party.⁽³⁾

A payment on account, or in diminution, is termed a payment *a conto*.

Thirdly. Trade may again be classed under three heads,

1. Trade on one's own account.
2. Trade upon commission; and

(1) All this will become clearer when we hereafter come to treat of the law of bills of exchange in the seventh section.

(2) Keure van Amsterdam van 30 January, 1776, in the 2nd Vervolg. der Handvesten. pag. 83.

(3) This is also termed *compensation*, vid. supra, page 271, 272.

3. Trade as a public shipper, to forward Trade goods to foreign parts.

Trade *on our own account* is that which is carried on at our own risk of profit and loss. Trade *on commission* consists in making the sale or purchase of wares, money, bills of exchange, effecting insurances, &c. at the usual or such other commission (*provisie*) as may be agreed upon.

The *commission agent* (*commissionaire*), provided he uses due diligence and prudence, is not liable, in case of non-payment by the purchaser of goods sold by him, unless he has taken upon himself the risk, under a *del credere commission*, for which he is entitled to an additional *commission*.

The trade of a *shipper* consists in the forwarding of goods to foreign parts, for which he receives a commission.⁽¹⁾

Fourthly. Trade may be carried on either by one person alone, or by several persons conjointly.

The latter is termed *company* or *partnership*, the special laws relating to which we shall set forth in the following sections.

Fifthly. In addition to the merchant himself, there are yet other persons necessary to the carrying on of commerce ; such as factors, that

(1) Martens, Grundrisz des Handels.rechts. S. 18.

Trade.

is, persons who undertake the management or superintendence of any affair or matter of business on account of another, by virtue of a power for that purpose.⁽¹⁾ *Brokers*, who buy and sell for merchants, and who are thus evidence for both parties.⁽²⁾ *Book-keepers*, who keep the necessary accounts of all matters relating to the concern in a set of books, consisting of the *journal* or *day-book*; the *ledger*, which contains the open standing accounts; the *invoice-books*, in which are entered the articles purchased, with the cost prices; the *cash-book*, containing the daily receipts and payments, &c.⁽³⁾

Lastly. We must enumerate, as persons necessary to commerce, *clerks*, *store-keepers*, *apprentices*, *porters*, *messengers*, and the like, according to the extent of the trade of the house.⁽⁴⁾

SECT. XI.

Partnership.

Company or partnership is a contract whereby two or more persons bring, or engage to bring, into community a certain stock, for the purpose of deriving in common an honest profit therefrom, with the mutual obligation of fairly ac-

(1) D. D. ad tit. ff. de instit. Act.

(2) See above, page 438, 439.

(3) See also the writers on the Italian method of book-keeping, as Desaguliers, De Graaf, Strabbe, and others.

(4) De Koopman, 1 D. No. 37-40.

counting to each other.⁽¹⁾ The essential requisites of this contract are, Partnership.

1. That each brings something into the society, or binds himself so to do, whether it be money or any other article, or whether it be diligence or labour.⁽²⁾

2. That the partnership be entered into for the mutual benefit of *both* parties ; since, if it were for the benefit of one only, it would then be a mere contract of *mandate*.⁽³⁾

3. That the object of the parties, in entering into this contract, be to gain a profit, in which each may expect to participate in proportion to the share which he has contributed to the common stock.

The stipulation that one only shall enjoy the profits, and the other bear all the losses, is termed taking the lion's share (*societas leonina*), and is not valid in law.⁽⁴⁾

4. The object of the partnership, and for which the contracting parties unite, must be a lawful one, and the profit which they seek to derive therefrom an honest one.⁽⁵⁾

To render this contract of partnership equitable Profit and loss.

(1) Pothier on Partnership, C. 1. S. 1.

(2) Pothier, d. 1. S. 7.

(3) Pothier d. 1. S. 8.

(4) L. 17. S. ff. pro socio. Pothier, d. 1. S. 9.

(5) L. 1. S. 14. ff. de tut. et rat. distrah. L. 35. S. 2. ff. de Contra Empt.

Profit and
loss.

able, the share of each in the profits ought to be in proportion to the value of his contribution to the common stock. This, however, admits of exceptions :

1. In case of a special agreement, whereby he who has brought in less than the other is so far favoured as to be allowed to share equally in the profits.

2. When a greater share of the profits is assigned to one of the partners, in consideration of his superior knowledge or skill in conducting the business, whereby the company has been benefited in that proportion.⁽¹⁾

With respect to the loss which the company may suffer, each of the partners ought to have his share apportioned to that which he would have been entitled to derive from the profits, had there been any, unless the degree of diligence and labour contributed by one of the partners, renders it but just that he should bear a smaller proportion, or, in fact, be wholly free from the loss.⁽²⁾

When it appears that the contract of partnership is merely a cloak, in order to cover a loan of money at an interest above the legal rate, it must be declared void, and all that such pretended partner has received, as his share in the

(1) Pothier, d. l. S. 11-14.

(2) L. 29. S. 1. ff. pro. soc. Pothier, d. l. S. 15.

profits, must be carried to his account as payments made in diminution of the principal.⁽¹⁾

Profit and loss.

SECT. XII.

Partnerships are either general or special.

The general may again be divided into two kinds—the one of all the goods of the respective parties ; the other only of all the profits or gain acquired during the partnership.

Different kinds of partnerships and conditions.

The partnership or community of all the goods⁽²⁾ is, that whereby the contracting parties agree to bring into common all their goods, whether present or future. No one is presumed to intend to enter into this kind of community ; it must be the result of an express and positive agreement.⁽³⁾ It may be entered into between persons, one of whom is much richer than the other.⁽⁴⁾ All the goods of which either of the parties is possessed at the time of entering into this contract become from that moment common, without any necessity of delivery.⁽⁵⁾ This company or community comprises everything which either of the parties possesses or acquires, under whatever title it may be derived,

(1) Pothier, d. 1. S. 16 et 17.

(2) *Societas universorum bonorum*.—See on this Pothier, d. 1. 2. C. S. 2-6.

(3) L. 7. ff. pro. soc.

(4) L. 5. S. 1. S. eod.

(5) L. 1. S. 1. L. 2. L. 3. ff. eod.

Different
kinds of
partner-
ships and
conditions.

whether by inheritance, gift, or legacy.⁽¹⁾ Those things alone are excepted which belong or come to one of the parties under the express condition of not being brought into partnership, or which have been acquired by criminal or dishonest means.⁽²⁾

This kind of company renders each of the parties liable for the debts of the other, due at the time of entering into this contract, as well also as for those which either has been obliged to incur, during the partnership, for the support of himself, or children, or family.⁽³⁾ This liability must not, however, be extended to foolish expenses, or to money wasted at play, or in debauchery, or to fines imposed for misdemeanors committed by either of the parties.⁽⁴⁾

The *partnership of general profits*⁽⁵⁾ is that whereby the parties enter into a community of all that which, during the partnership, may be acquired by either, from what trade soever it may be.⁽⁶⁾ This partnership is confined, however, to mere *profit*, and therefore, whatever is acquired

(1) L. 3. S. 1. L. 52. S. 16. ff. eod.

(2) L. 53. L. 54. ff. eod.

(3) L. 73. ff. eod.

(4) L. 52. S. 18. L. 55. L. 56. L. 59. S. 1. ff. eod.

(5) *Societas universorum, quæ ex quæstu veniunt.*—See also Pothier, d. l. S. 7.

(6) L. 7. L. 13. L. 52. S. 8. ff. pro. soc.

by inheritance, gift, or legacy, does not fall within it.⁽¹⁾

Different kinds of partnerships and conditions.

The parties also are not liable for the debts of each other, either existing at the time of the contract entered into, or incurred during the contract, for objects not relating thereto.⁽²⁾

The special companies or partnerships are,

1. Those which are entered into for the purpose of possessing certain particular things in common, and to share the fruits thereof.⁽³⁾

2. Partnerships for the purpose of carrying on in union any particular act or handicraft trade.⁽⁴⁾

3. Partnerships for carrying on any particular species of commerce. Under this head is comprehended,

1. Such contract as two or more persons enter into, in order to carry on a certain trade or business, in the name of all the partners in common; for example, in the name of “*N. N. and Company.*” This is termed the firm of the partnership.

2. The company or partnership termed *en commendite*, that is, when a merchant agrees with any particular person to carry on any trade or business in partnership, as to profit and loss,

Latent partnerships.

(1) L. 9. L. 10. L. 11. L. 71. S. 1. ff. eod.

(2) L. 12. ff. eod.

(3) L. 5. ff. eod. Pothier, d. l. S. 8.

(4) Pothier, d. l. S. 9.

Latent
partner-
ships.

but to be conducted in the name of this merchant alone, and the other merely brings in a certain sum of money as the capital, under the condition that he shall draw a certain proportion of the profits.

3. *The anonymous company or partnership*, that is, a contract whereby two or more persons agree to share in a certain trade or business, to be conducted by one of them in his name alone.⁽¹⁾

The contracts of partnership are frequently qualified by *special covenants*, for example, at what time the partnership shall commence, and how long it shall continue; what shall be the power of each particular partner, in the conduct or management of the concern; what shall be the proportion of each in the profits and losses; how to secure any particular member, who, although partner for an equal share, has brought more capital into the concern than the others.⁽²⁾

SECT. XIII.

Rights and
duties of
partners.

A partnership once commenced gives to each member of the firm several rights, while at the same time it imposes on him several duties, not only with respect to each other, but also with respect to third persons. These several rights and duties may be enumerated as follow :

(1) Pothier, d. l. S. 10. Martens, Grundrisz des Handelsrechts, S. 21-23.

(2) Pothier, d. l. 3. C. pag. 54-68.

1. Each partner is at liberty to dispose of, or apply, the partnership property for partnership purposes.⁽¹⁾ Rights and duties of partners.

2. Each of the partners must bear his share of the costs and charges necessary for the care and preservation of the partnership property.⁽²⁾

3. No one of the partners can make any alteration or repairs in the immoveable property belonging to the partnership, without the consent of the others.⁽³⁾

4. No one of the partners can alienate or pledge the partnership property beyond his own share therein.⁽⁴⁾

5. One of the partners may indeed admit a third person as partner with him for *his own share*, but not as a general partner.⁽⁵⁾

6. In those partnerships which carry on trade as a firm, each of the partners is liable for the whole of the debts of the company :⁽⁶⁾—provided these debts have been created by a person who had power to bind the partnership, and provided

(1) Pothier, d. l. 5 Hoofdst. S. 1.

(2) L. 12. ff. comm. div. Pothier, d. l. S. 2.

(3) L. 28. ff. comm. divid. L. 11. ff. si serv. vina. Pothier, d. l. S. 3.

(4) L. 68. ff. pro soc. Pothier, d. l. S. 4.

(5) L. 47. S. fin. ff. de Reg. Jur. L. 20. L. 21. L. 22. L. 23. ff. pro soc. Pothier, d. l. S. 5.

(6) Pothier, d. l. 6 C. S. 2. et Notes, pag. 235-237.

Rights and
duties of
partners.

they were made in the name of the company.⁽¹⁾

7. A partner *en commendite*, and he who has a share in an anonymous company, is liable to his copartner, but not to a third person.⁽²⁾

8. Each partner is bound to answer to his copartner, for all that he is indebted to the partnership under deduction of what it is indebted to him. This debt of one partner to the company is measured by the amount of capital which each is pledged to bring in, so far as he has not yet brought it in; and by the amount he has drawn upon the general cash of the concern for his own private expenses: and he is also bound to make good all damage done to the partnership property by his neglect or carelessness.⁽³⁾

9. Each partner is bound, in proportion to his share in the capital, to satisfy the claims of his copartners upon the concern, under deduction of what they on the other hand owe to the company.⁽⁴⁾ From the obligations which arise out of this contract of partnership there lies a *personal* action, for each partner and his heirs against his copartners and their heirs, to enforce the performance of all those obligations which

(1) Pothier, d. l. S. 3 et 4.

(2) Pothier, d. l. S. 5.

(3) Pothier, d. l. 7 Cap. S. 1-5.

(4) Pothier, d. l. S. 6.

flow from the nature of the contract itself, or from the special covenants inserted in the deed of partnership.⁽¹⁾

Rights and duties of partners.

SECT. XIV.

All partnerships end—

How partnership ends.

1. By efflux of the time fixed for the duration of the partnership.

2. By the extinction of the subject matters or completion of the object of the partnership.

3. By the death or bankruptcy of one of the parties. However, death does not extinguish the partnership when one of the covenants is that the partnership shall continue to the heirs.⁽²⁾

4. By the wish of one of the parties to retire from the concerns, provided this wish be expressed *bona fide* and not at an unreasonable or inconvenient time.⁽³⁾

The effect of the dissolution of a partnership is, that all contracts thereafter entered into by either of the parties is to be considered as made on his own account, unless they necessarily have a relation to the affairs of

(1) This is termed *actio pro socio*. Voet, ad tit. ff. pro soc. n. 9. seqq.

(2) Herein our modern law differs from the Roman law. Bynkershoek, Quæst. Jur. Priv. lib. 3. cap. 10. pag. 450. vs. Noli objicere, &c.

(3) Pothier, d. l. 8. cap.

How partnership ends.

the late concern.⁽¹⁾ The late partners are entitled to demand from each other the liquidation of the partnership accounts, and a general account and division of the partnership property. For this purpose a statement is first drawn out of what each owes to the concern, and his counter claims are set-off. After this a *statement* is to be made out of all the partnership property, in which are to be included the sums for which each, on account taken, is found to be a creditor of the concern, and which they are to be paid before any division takes place. Every article then of the partnership property is valued. After this, the division commences, which is decided by lot; he who draws the greater lot being discharged with a proportional payment to him who draws the smaller lot. Sometimes this division takes place by setting up the partnership stock to the highest bidder among themselves.

The debts due to the concern, which are considered good (*solide*), are in like manner divided by lot, and those which are held bad or doubtful are given over to some one to collect, and the money accounted for. The costs of the division are borne in common.⁽²⁾

(1) L. 40. L. 65. S. 10. ff. pro soc. Pothier, d. l. 9. C. S. 1.

(2) Pothier, d. l. S. 2-6.

CHAPTER II.

General View of the Maritime Laws of Holland.

SECT. I.

SINCE according to the general law of nature and of nations, the sea can be the special property of no one, and in fact the nature of the thing does not admit of it, it follows that the navigation of the sea is free to every one, and that all impediments thereto are so many invasions of the natural rights of man.⁽¹⁾ After, however, a title to land was acquired by occupancy, a certain *territorial* right over the sea adjoining these lands was introduced,⁽²⁾ and on this is founded the justice of confining the right of fishing in, and obtaining from, such adjoining seas its valuable productions, such as corals, pearls, amber, &c., to the inhabitants of these

Freedom
of naviga-
tion.

(1) D. A. Azuni, *le Droit Maritime de l'Europe*. Tom. 1. Chap. 1. Art. 1. pag. 1-11. The controversy which arose in the beginning of the seventeenth century, between Grotius and Selden, respecting the dominion of the sea, is well known. The former, in his tract, *Mare liberum sive de jure, quod Batavis competit ad Indiana commercia*; to be found at the end of several editions of the *Jus Belli et Pacis*:—The latter, in his tract, *Mare clausum, sive de dominio maris*.—(Lond. 1635.)

(2) Bynkershoek, *de dominio maris*, Cap. 2.

Freedom
of naviga-
tion.

lands.⁽¹⁾ Hence also the right to prohibit foreign vessels to make use of the shores and harbours of these lands otherwise than under certain limitations.⁽²⁾ Also that no entire fleet of a foreign state, but only a limited number of vessels, should be suffered to enter.⁽³⁾

This territorial right over the adjoining seas, or waters, relates therefore more particularly to the sea coast, harbours, bays, straits, &c.; in order to regulate *there* the free entry of foreign vessels:⁽⁴⁾ as well as to the imposition of duties on imports and exports, and the making of regulations limiting the right of fishing on the coast.⁽⁵⁾

This question cannot admit of doubt, that when war arises between two states, the commerce which previously existed between these states must cease: for the consequence of this state, is that, during the war, privateers and letters of marque are fitted out on each side, and prizes made by these vessels,⁽⁶⁾ They must, however, in order to prevent their being considered as pirates, be provided with a proper commission from their sovereign.⁽⁷⁾

(1) Grotius de J. B. et P. Lib. 2. Chap. 3. S. 8. Azuni, d. l. Art. 2. S. 3. pag. 14.

(2) Azuni, d. l. S. 4-6

(3) Azuni, d. l. S. 7.

(4) Azuni, d. l. Chap. 2. Art. 1-5. pag. 62 et suiv.

(5) Azuni, d. l. Art. 8. pag. 91 et suiv.

(6) Azuni, d. l. Tom. 2. Chap. 4. pag. 246 et suiv.

(7) Bynkershoek, Quæst. Jur. Publ. Lib. 1. Cap. 17 et 18.

SECT. II.

The question how far the state of war, between two powers, affects the rights of neutral nations to trade with either of the belligerent parties, is of a more difficult and complex nature.⁽¹⁾

Navigation
of neutral
nations.

To the resolving of this question it is, in the first place, necessary to define what we understand by *neutrality*. Neutrality we consider to be the abstaining from doing any act which has a direct or immediate relation to the war, then carried on between the parties, or which evinces a disposition to afford any assistance to either, or take any part therein.⁽²⁾

From this definition of neutrality, the answer to the question, respecting the right of neutrals to trade with the belligerents, upon the general principles of the law of nations, becomes easier.

The carrying on trade with any nation, with whom we are in friendship, but with whom another state is at war, does not from this circumstance give to the latter power, any right to interrupt our commerce with the former.⁽³⁾ Although

(1) From among the multitude of writers on this subject, and who are to be found enumerated in L. Holst, Versuch einer kritischen uebersicht der Volker-Seerechte. (Hamb. 1802)—we content ourselves with referring to Bynkershoek.

(2) Azuni, d. l. Chap. 1. Art. 2. pag. 12 et suiv.

(3) Azuni, d. l. Chap. 4. Art. 1. pag. 50 et suiv.

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of neutral
nations.

even this commerce should consist in the exporting on our part such articles as arms, gunpowder, timber, and the like.⁽¹⁾ But it is considered a *violation of neutrality*, when, for example, we voluntarily take part in a naval engagement between these contending powers, and afford help to either; when a neutral vessel acts as a spy in favour of one party, to the prejudice of the other; when a neutral vessel attempts to enter a port actually in a state of blockade, without the consent of the officer blockading;⁽²⁾ when a vessel is unprovided with the necessary papers, to prove she belongs to a neutral nation.⁽³⁾ Upon the same principle, also, according to the universal law of nations, we ought to conclude, that a neutral vessel, laden with goods belonging to the enemy, is not a good prize: but that the general rule of *free bottoms make free goods* must be followed; so also, on the other hand, neutral goods found on board an enemy's vessel, are not subject to capture, or to forfeiture, with the vessel which carries them.⁽⁴⁾

But, however, notwithstanding these general principles, as the carrying on of trade by a neutral power, with a state with which we are at

1) S. De Cocceji, Dissert. Proæm. in Grotium de J. B. et P. S. 789. pag. 619.

(2) Azuni, d. l. Art. 2 et 3. pag. 60-96.

(3) Lampredi, traduit par Peuchet, d. l. pag. 163.

(4) Azuni, d. l. Chap. 3.

war, has necessarily this effect, that the latter thereby is better enabled to continue the war, particularly when he is supplied by this trade with arms, ship timber, and the like—this universal freedom of trade, has by a number of treaties and conventions, between different states, been limited and restrained.⁽¹⁾

Navigation
of neutral
nations.

And these treaties have, by mutual consent, defined what sort of articles may be furnished by the neutral to either of the belligerents;⁽²⁾ further, how to deal with neutral vessels having goods on board belonging to the enemy, and again with the case of goods, belonging to neutrals, found on board the enemy's ships, and, lastly, to what places a free navigation should be permitted.

SECT. III.

The trade of Holland in this respect, has been the subject of various *treaties* and *conventions*, with other states. In the oldest *treaties* we meet with only the general condition, that neither of the contracting parties, shall in any wise aid or assist the enemies of the other.⁽³⁾

The law of
Holland on
this head.

The rule then in force was, “Wherever I find,

(1) Azuni, d. l. Chap. 2. Art. 4, pag. 96 et suiv.

(2) Azuni, d. l. Art. 5. pag. 141 et suiv. Lampredi, d. l. Part. 2. pag. 199 et suiv.

(3) Treaty between the King of Sweden, and their High Mightinesses, of 5 April 1614, Art. 5. G. P. B. 4 D. pag. 276.

The law of
Holland on
this head.

I take," (*Waar ik u vind, neem ik u*); and upon this principle, the enemy's goods were not protected in neutral vessels. Afterwards, the principle that *free bottoms make free goods*, was adopted as the universal rule; this gave occasion to a more particular specification of those articles of neutral commerce, which should be considered as contraband.

The treaty of their *High Mightinesses*, in the year 1674, with *Great Britain*, is remarkable for its provision on this head;⁽¹⁾ for there we find enumerated among the prohibited articles, all sorts of weapons of war, soldiers' horses, with their accoutrements, and every kind of munition of war. On the other hand, among the permitted articles, we find cloths, woollens, linens, silk or cotton manufactured articles, wearing apparel, gold, silver, and other metals, coals, grain, tobacco, meat, fish, and all other kinds of provision. Further, cotton, hemp, flax, and pitch, cables, sails, anchors, masts, planks, deals, beams, or scantling; and all kinds of materials for building or repairing ships.

We also meet with the same or similar provisions in various treaties concluded between the state and different foreign powers, as with

(1) Treaty of Navigation, between Charles II. King of England, and the States General, of 1st December 1674. Art. 2, 3, 4, et 8. G. P. B. 3 D. pag. 352.

Sweden in 1679,⁽¹⁾ with *Denmark* in 1701,⁽²⁾ with *Sicily* in 1753,⁽³⁾ with the *United States of America* in 1782,⁽⁴⁾ and others. The law of Holland on this head.

From which several treaties, when compared together, the following rules may be deduced:

1. That all those articles are prohibited, as *contraband of war*, which are of direct use in war.

2. That materials for ship building are permitted by most nations, and are sometimes indirectly suffered to pass.

3. That provisions are in general considered as permitted articles.

SECT. IV.

The oldest maritime laws of which we find mention made in this country, are those given by *Earl Floris the IV*, to *West Kappell* in *Zealand*, in 1223.⁽⁵⁾ In the year 1475, a maritime ordinance was made by the city and towns of *Amsterdam*, *Hoorn*, *Enkhuizen*, *Monnikendam*, and *Edam*,⁽⁶⁾ which appears to be the oldest in Holland. Maritime laws of Holland.

(1) G. P. B. 3 D. pag. 1394.

(2) G. P. B. 5 D. pag. 397.

(3) G. P. B. 8 D. pag. 261.

(4) Le Long, Koophandel van Amsterdam, 4 D. pag. 220.

(5) S. Van Leeuwen, Batav. illustr. pag. 137-142.

(6) Commelin, Beschr, van Amsterdam, 2 D. 6 B. pag. 915 et 916. We also find a very old ordinance relating to the laws

Maritime
laws of
Holland.

But the regulations concerning the maritime law of Holland are chiefly to be found in the ordinance of the *Emperor Charles V.*, under the head of *Navigation* of the 19th July, 1551,⁽¹⁾ and the subsequent ordinance of his son *Philip II.*, of the 31st of October, 1563.⁽²⁾ Where a *casus omissus* occurs, under these ordinances, we have recourse to the *Roman law*,⁽³⁾ the laws of *Wisbuij*,⁽⁴⁾ and the like.

Various *placaats* have also been issued from time to time by the States-General on this subject,⁽⁵⁾ and the principal maritime cities have also made various regulations⁽⁶⁾ respecting *averages*, *insurance*, &c., which have been acted on as law.

of navigation, in *Wagenaar*, *Beschr. v. Amsterdam*, 9 St. Byl. A. pag. 466.

(1) G. P. B. 1 D. pag. 783.

(2) G. P. B. 1 D. pag. 796. This ordinance has been published with very excellent notes, by T. Van Glins (Amst. 1665, in 4to.).

(3) See P. Peckii *Commentarii ad rem nauticam cum notis A Vinnii* (Amst. 1668).

(4) A. Verwer, *Nederl. Zeerechten*, pag. 1-52. P. Le Clercq. *Lighaam van de Zeerechten*, pag. 126-188.

(5) To be found in the G. P. B. and in the *Recueil van Zee Zaken*.

(6) These are quoted by Proff. V. D. Keessel, *Thes.* 685 et 711. A new ordinance relating to maritime affairs for this country in general, and containing all the laws relating thereto, in one digest, would be of great use. *Azuni, le Droit Maritime de l'Europe*, Tom. 1. pag. 263.

SECT. V.

Among the special laws and customs relating to commerce and navigation, which prevail in this land, we must not omit to notice that of *staple right*, particularly that granted to the city of *Dordrecht*,⁽¹⁾ and also to some other places.⁽²⁾ By this *right* we understand “a privilege granted by the sovereign to the inhabitants of a certain place, to compel the masters of trading vessels, or merchants, trading along their coasts, to discharge their cargo there for sale, or, on failure thereof, to pay certain duties.”⁽³⁾ Staple right.

Some towns have obtained an exemption from this obligation; others have made particular agreements and compositions with respect thereto. A variety of legal questions have arisen on the subject of this privilege, which have, however, been generally decided in favour of it. Among others, one in 1540, and again another in 1541, when this privilege of staple right was in many respects settled and defined;⁽⁴⁾ and in

(1) This was first established there in the year 1299. See *Van De Wall, Handvesten Van Dordrecht*, 1 D. pag. 100.

(2) Such as *Naarden*: see *Mieris, Charter Boek*, 2 D. pag. 656 et 826. *Enkhuizen*: see the by-laws of that town, pag. 93 et 94. *Midde lbug*: see *Boxhorn, Chron. van Zeeland*, 1 D. pag. 140.

(3) *V. D. Wall. d. l. pag. 103.*

(4) With regard to all this see *N. Lobedanius. Diss. de Jure Stapulæ* (Traj. 1757.), and see principally *Van De Wall, Hand-*

Staple
right.

the year 1703, an agreement was entered into between the cities of *Dordrecht* and *Middleburgh* on this subject;⁽¹⁾ and in the year 1719, with the *East-India Company*;⁽²⁾ in the year 1713 with the city of *Nimuegen*;⁽³⁾ and also with the committee of the States-General in the year 1763, in consequence of the claiming of this privilege of staple right even with respect to vessels loaded with rice grown on the government lands outside the dykes.⁽⁴⁾

SECT. VI.

Duties on
exports
and im-
ports.

Foreign trade, both by exports and imports, is subject to a variety of duties, of which the principal are the following :

1. The duties on *exports* and *imports*.—Without entering upon the regulations respecting these, which existed before the year 1725, they may very conveniently be reduced to those comprised in the *placaat of the States-General* of 31 July, 1725, and the *list* thereto annexed of *general duties on goods and merchandize imported*, as containing all the fundamental principles.⁽⁵⁾

vesten van Dordrecht, to be found in a number of places in the index, on Staple, Staple-right, Staple-freedom.

(1) G. P. B. 5 D. pag. 748. et Van De Wall, d. 1. pag. 1950.

(2) Van De Wall, d. 1. pag. 1963-1968.

(3) Van De Wall, d. 1. pag. 1977.

(4) Van De Wall, d. 1. pag. 2034-2039.

(5) G. P. B. 6 D. pag. 1338-1378.

By that placaat it is declared,

Duties on
exports
and im-
ports.

1. That on all goods, wares, and merchandize, entering into or departing from any of the ports situate on the seas, streams, or rivers of this country, the duties therein mentioned are to be paid.⁽¹⁾

2. Some goods, however, are exempted from these duties; for example, articles delivered into the magazines of government, or for the use of ships of war, East India goods, and goods shipped for Surinam, &c.⁽²⁾

3. By this placaat are regulated the necessary forms to be observed in the entering and clearing out of goods, and obtaining clearances and permits.⁽³⁾

4. The fines, forfeitures, and penalties, for untruly declaring, or improperly entering such goods.⁽⁴⁾

5. How to proceed with respect to the loading or discharging of goods, after obtaining the necessary clearances or permits.⁽⁵⁾

6. Special directions respecting the payment of these export duties at the place where they are first shipped.⁽⁶⁾

(1) Plac. 31 July 1725. Art. 1-6.

(2) Ibid. Art. 7-25.

(3) Ibid. Art. 26-42.

(4) Ibid. Art. 43-54.

(5) Ibid. Art. 55-79.

(6) Ibid. Art. 80-104.

Duties on
exports
and im-
ports.

7. With respect to the duties on imports, payable at the place where the vessel discharges her cargo, whether such cargo be brought by sea, or by the rivers, or by inland navigation.⁽¹⁾

8. Regulations also to be observed with respect to the discharging, unloading, or transporting of the goods.⁽²⁾

9. The regulations with respect to the procuring of a permit for the transport of goods from one port to another within the territory.⁽³⁾ From the necessity, however, of procuring this passport, the common market and ferry-boats are exempted, as are also those who transport trifling articles for consumption ; and, in certain cases, the persons who inhabit the demesne lands of the States General.⁽⁴⁾

10. Lastly, are contained the regulations relative to the mode of proceeding against those who violate the ordinance, as also the respective duties of commissaries, searchers, and waiters, &c.⁽⁵⁾

In the above list various alterations have necessarily been made, from time to time, which

(1) Plac. 31 July 1725. Art. 105-133.

(2) Ibid. Art. 134-149.

(3) Ibid. Art. 150-159.

(4) Ibid. Art. 160-188.

(5) Ibid. Art. 202. et seqq.

are to be found in several existing ordinances and *resolutions* relating thereto.⁽¹⁾

Duties on
exports
and im-
ports.

As it is seldom convenient to the merchants to attend personally to all this detail, or to employ their clerks for the purpose, they engage certain persons for this business, who are termed agents or *ship-brokers*, who enter and clear out all vessels at the Custom-house, and procure the necessary clearances and permits.⁽²⁾ These agents or brokers have a right of preference in the estate of a bankrupt trader, for all disbursements made by them for Excise and Custom-house duties; duties on imports and exports, tonnage, and *ad valorem* duties, but not for any longer period than a month after the disbursements made;⁽³⁾ which period was, however, afterwards extended to *three months*.⁽⁴⁾

2. *Tonnage and ad valorem duties.* According to the above-mentioned ordinance of 31 July, 1725, a tonnage duty of five stivers per *last* must be paid by all outward-bound ships and vessels sailing from any of the ports of this country; and on all inward bound vessels entering our ports, a duty of *twelve stivers* for each *last*, which

(1) Very useful for this purpose is the improved and augmented list, which we find in Le Jong, Kooph. van Amsterdam, 4 Deel, pag. 229 et seqq.

(2) Wagenaar, Beschr. van Amsterdam, 9 Stuk, pag. 436.

(3) Publ. Holl. 28 April 1764. G. P. B. 9 D. pag. 1244.

(4) Publ. Holl. 5 April 1786. G. P. B. 9 D. pag. 559.

Duties on
exports
and im-
ports.

frees the vessel for twelve months. The ships are, for this purpose, measured by a sworn officer,⁽¹⁾ who furnishes a *certificate of admeasurement*, which is good for two years. The amount of the *tonnage* duty (*last geld*) is marked on the certificate. Ships belonging to the East and West India Companies, and to the Company of Surinam, are free from this duty, as are also vessels employed in the great and small fisheries, and those too which come into our ports through distress, or for the purpose of wintering therein.⁽²⁾

The *ad valorem* duty (*veil geld*) as it was settled in 1725, until further regulation, consists of one-half per cent. upon all exported, and of one per cent. on all imported goods.⁽³⁾ The duty remained thus until the year 1760, when the extraordinary *ad valorem* duties were increased by adding one per cent. on the imports, and one-half per cent. on the exports,⁽⁴⁾ which

(1) All ships or vessels employed in the inland navigation, must likewise be measured, in order that the inland tonnage, water, pleasure, and passage money, may be levied on them in proportion to their size.—Ordinance on that subject, of 26 November 1805.

(2) Plac. 31 July 1725. Art. 189-201.

(3) Plac. 6 June 1702. G. P. B. 5 D. pag. 303. List of 31 July 1725. in fin. Art. 8-11.

(4) Public. Gener. 4 Feb. 1760, in the Nederl. Jaarb. of 1760, pag. 85.

have since been annually renewed by subsequent ordinances.⁽¹⁾

Duties on
exports
and im-
ports.

3. *Duties on Foreign Productions.*

At the commencement of the year 1806, this duty was laid upon all foreign goods imported into this country, independent of the usual duties on exports and imports.

The nature of this duty, and the mode of enforcing it, are defined by a special ordinance.⁽²⁾

With respect to *foreign brandies and distilled liquors*, a separate ordinance was passed.⁽³⁾

4. *Light-House and Beacon Money.*

For the protection of vessels, light-houses and beacons have been erected in different places, as at *Egmond on the sea, Scheveningen, Huisduinen, Vlieland, Terschelling, Urk, &c.* To support the expences of these establishments a duty was laid in the year 1668, on all vessels entering or going out of the *Vlie*, the *Terel*, and *Terschelling*, of a certain number of stivers for each last, varying according to the size and nature of the vessel as regulated in a list thereby given.⁽⁴⁾ In the year 1762, the beacon-duty was provisionally raised for three years one-third, and it was further provided that these beacons should

(1) Nederl. Jaarb. 1761. pag. 87 et 1779. pag. 90.

(2) Ordonn. 18 Decemb. 1805.

(3) Ordonn. 24 Decemb. 1805.

(4) Ordonn. 19 Dec. 1668. G. P. B. 3 D. pag. 1303.

Duties on
exports
and im-
ports.

be kept lighted during the three summer months, and that ships having once paid the duty, should not be bound to pay it again in case of their being driven in by stress of weather, which regulation was afterwards renewed.⁽¹⁾

SECT. VII.

Pilotage.

To render navigation more secure, particularly near the land, where, from being unacquainted with the depth of water and the shoals, there is great risk of striking, pilots, or persons acquainted with all these matters are employed. A master of a ship or vessel is bound to take a pilot where it is usual or necessary under the the penalty of fifty gold reals, besides which he is liable in costs, damages, and interest, which the merchant may have suffered by his default.⁽²⁾ A pilot, while on board, is maintained at the charge of the master, but this charge is paid by the merchant, unless the master's wages should exceed six pounds Flemish, in which case it comes under *general average*.⁽³⁾

For regulating the duties of pilots, their qualifications and payment, various ordinances

(1) Public. 28 July 1762. G. P. B. 9 D. pag. 1251. Nederl. Jaarb. 1762. pag. 471 et 1765. pag. 451-1771. pag. 838 et 1777. pag. 813.

(2) Plac. of King Philip of 1563. Art. 9. De Groot, Inleid. 3 B. 20 D. S. 10.

(3) Plac. 1563. d. Art. 9. De Groot, Inleid. 3 B. 29 D. S. 15.

have been made; as, in the year 1661 for the *Pilotage* pilots of the *Maese* and the *Goereesche Gat*, or Channel;⁽¹⁾ in 1698 for those of *Stuisduinen*, the *Helder*, *Petten*, *Calantsoog*, the *Terel*, and other places thereabout,⁽²⁾ and at the same time for those of *Vlieland* and *Terschelling*;⁽³⁾ in 1702, for those of the *Stryensche Sas*;⁽⁴⁾ in 1764, for those of *Willemstadt*;⁽⁵⁾ and lastly, in 1773 a new regulation was made at Amsterdam respecting the piloting of ships up the *Terel* as well as the *Vlie*.⁽⁶⁾

The chief heads of these regulations are the following: the pilots must first pass an examination, receive the badge and number of a pilot, and be sworn.⁽⁷⁾ Those who act as pilots without having been admitted pay a penalty of twenty-four guilders.⁽⁸⁾ They must be able-bodied

(1) Ordonn. Holl. 1 Octob. 1661. G. P. B. 2 D. Col. 2691.

(2) Ordonn. Holl. 24 Octob. 1698. G. P. B. 4 D. pag. 1307.

(3) G. P. B. 4 D. pag. 1316.

(4) Order in Council of his Majesty the King of Great Britain (William III.) as Lord of Niervaart, 9 January 1702.* G. P. B. 5 D. pag. 929.

(5) Further Order in Council of 9 June 1746. G. P. B. 7 D. pag. 1554.

(6) By-law. 29 January 1773, in the Second Supplement to the By-laws of Amsterdam, pag. 223.

(7) Ordonn. 1698. Art. 1.

(8) Ibid. Art. 6 et 30.

* Query.—Whether this date should not be 1701, as King William died on the 8th of March of that year.—T.

Pilotage. men above five and twenty years of age, and under sixty, well acquainted with the channels, passages, and rivers.⁽¹⁾ They must at all times be provided with their badge, which at their death must be returned by their widows or heirs,⁽²⁾ and must not be pledged, sold, or lost.⁽³⁾ They must shew this badge to the master before they take charge of the ship.⁽⁴⁾

Every pilot boat must carry a white flag at the mast head, on which, or on the main sail, his number is to be distinctly painted.⁽⁵⁾ They are bound to bring the vessel in over the bar or flat (vlak), and not further, unless the master wishes to be carried higher up, which they are bound to do for a reasonable compensation.⁽⁶⁾ They are bound to board vessels at least one mile outside the shoals or flats.⁽⁷⁾ It is part of their duty also from time to time to sound the channels, and pay attention to the shifting of the banks, shoals, capes, passages, or channels, and the buoys.⁽⁸⁾

The fees of the pilots are regulated according to the number of feet which the ship draws, its

(1) Ordonn. 1698. Art. 2.

(2) Ibid. Art. 4.

(3) Ibid. Art. 5.

(4) Ibid. Art. 6.

(5) Ibid. Art. 40.

(6) Ibid. Art. 7.

(7) Ibid. Art. 8.

(8) Ibid. Art. 10.

size, and according as it is the summer or winter season.⁽¹⁾ If a pilot wilfully and maliciously, or by accident, or carelessness, or bad judgment, runs a ship a-ground, he is punished with suspension of his office, dismissal, banishment, corporal or even capital punishment, according to the circumstances of the case.⁽²⁾ Pilotage.

Pilots when on board a vessel for the purpose of taking her out or in, and neglecting to sound or cast the lead, are subject to a fine of twenty-five guilders whether any accident happen or not.⁽³⁾

SECT. VIII.

As humanity requires that we should render Shipwreck. all possible assistance to vessels which find themselves in danger in the vicinity of our coasts and harbours, and not plunder the unfortunate sufferers,⁽⁴⁾ so the laws of Holland have made especial provision in this respect. Although from the most ancient times wrecks have been held as belonging to the Earls of Holland in their right of sovereignty, yet under the dominion of the later Earls a remarkable relaxation of this right

(1) Ordonn. 1698. Art. 9, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, &c.—By-law of Amsterdam, of 29 Jan. 1773.

(2) Ibid. Art. 11.

(3) Resol. Holl. 22 Dec. 1705. et 14 Aug. 1706. G. P. B. pag. 1528.

(4) Grotius, de J. B. et P. Lib. 2. Cap. 7. S. 11. Huber de Jur. Civil. L. 1. Cap. 19. n. 15 et 16.

Shipwreck has taken place in favour of the right of the owners of these goods, in order to protect their property from plunder;⁽¹⁾ in proof whereof, we may instance the privileges granted by the Emperors to particular persons or bodies for this purpose,⁽²⁾ different conventions on this head with foreign powers,⁽³⁾ and a number of placats issued both by the Emperor Charles V. and his son Philip, and subsequently by the States General themselves.⁽⁴⁾ By all these, the right of the owner to reclaim his goods, either wrecked or found at sea, first within a year and a day, and afterwards without any limitation of time, is recognized. Lastly, the States of Zealand in the year 1751,⁽⁵⁾ and those of Holland in the year 1772,⁽⁶⁾ made express regulations with respect to the preserving and securing shipwrecked property to the owners.

(1) De Groot, *Inleid*, 2 B. 4 D. S. 36. *Regtsagel. Observ.* 4 D. Obs. 18.

(2) P. à Leydis, *de cur. Reipl. Cap.* 1. S. 3.

(3) For example, with Denmark, in 1324; with England, in 1495; with France, in 1678; with Sweden, in 1679; at the Peace of Ryswyk, in 1697; at the peace of Utrecht, in 1713; not to speak of the treaties with the Turks, Morocco, Algiers, Tunis, and Tripoli.

(4) Plac. of Emperor Charles, of 13 Sept. 1549; Plac. of King Philip of 15 May 1754; Plac. 4 Nov. 1606; 24 May 1613; 25 April 1620; 2 Dec. 1663; 28 Jan. 1739. See also Prof. Van Der Keessel, *Theas. Jur. Holl. et Zeel. Theas.* 193-197.

(5) Plac. Zeel. 14 June 1751. G. P. B. 8 D. p. 907-913.

(6) Plac. Holl. 22 July 1772. G. P. B. 9 D. pag. 811-813.

These laws also prescribe⁽¹⁾ the duty incumbent on every one to afford all possible help to vessels in distress, and also to preserve the property on board ; and provide that immediate notice be given in such case to the commissary of pilots, or the magistrate of the place. Shipwreck

Whoever on such an occasion is guilty of plundering a wreck, is subjected to severe and even capital punishment.⁽²⁾ Those, on the contrary, who afford assistance, are entitled to a reasonable *salvage*. When any dispute arises respecting this salvage, or the sum to be paid for pilotage, it is settled by *commissaries* appointed for these matters, or by the *Court of Pilotage* (*Goede Mannen Van de Pilotagie*), from whose decision formerly an appeal lay to the standing committee appointed by the States General for that and other purposes.⁽³⁾ After the resolution of 1795 it became doubtful what was the proper tribunal before which to bring this appeal. For some time the *Court of Holland* exercised this power, afterwards the Court of Admiralty of the Batavian Republic.⁽⁴⁾ At

(1) See particularly the Placaats of 24 Oct. 1698, and 22 July 1772.

(2) See, amongst many others, the Plac. of 4 Jan. 1724. G. P. B. 6. D. pag. 797.

(3) Plac. 24 Octob. 1698. Art. 12. G. P. B. 5 D. pag. 1310 et 1318. Plac. 22 July 1772.

(4) Instr. for the Admiralty, of 2 April 1802. Art. 49 et 65.

Shipwreck: present the *Board for Sea and Land Duties* decides all matters in appeal regarding pilotage, and all disputes arising therefrom.⁽¹⁾

(1) Inst. for that Board, of 12 July 1805, Art. 20. n. 4. et Art. 23.

CHAPTER III.

Of Ships, Hypothecation, and Bottomry of the Keel.

SECT. I.

By a ship or vessel we understand a structure Ships. so framed, that by means of boards or planks raised upon its bottom, which is termed its *keel*, it is borne through the water. However ancient the art of ship building may be,⁽¹⁾ the *Egyptians* and *Phœnicians* were the first people who exercised the art of navigation.⁽²⁾ The principal division of ships is founded on the different purposes for which they are intended, into *ships of war*, and *ships of trade*, or *merchant vessels*. Both these sorts have again their subdivisions, as first from their *size*, as a seventy-four, sixty, fifty gun ship, or a one or two masted vessel, &c. Again, from their build or construction, as frigates, brigs, galliots, smacks, &c. Next, from the *particular country* or *region* to which they trade, as Baltic or North Traders, or Greenlanders; further, from the nature of

(1) N. Witsen, *aeloude en hedendaagsche Scheepsbouw en Bestier*, 1 D. 1-6 Hoofdst.

(2) Huet, *Histoire du Commerce et de la Navigation de Anciens*, Chap. 7.

Ships.

the cargo or goods which they convey, as salt traders, herring busses, peat vessels, &c.; again from the *special use* for which they are designed, as fire ships, passage boats, trek-schuits, &c. To say nothing of other kinds, which are not comprised under the above denominations, as boats, shallops, praams, punts, &c.⁽¹⁾

SECT. II.

Rights with respect to ships of war.

Ships have certain special rights which deserve to be particularly noticed: and first with respect to ships of war.

1. In this country it is not lawful to build, equip, or hire out vessels of this description to any foreign power for the purpose of thereby annoying any neutral or allied state.⁽²⁾

2. No foreign ship of war is allowed to enter our rivers or navigate within our harbours, bays, or roads, on pain of seizure of the vessel, and corporal punishment of the men; and such armed merchant vessels only are permitted to enter and depart as are merely armed for the purpose of self-defence.⁽³⁾

(1) N. Witsen, d. l. and the writers on ship-building.

(2) Plac. Gener. 27 July 1627. et 10 Dec. 1667. G. P. B. 3 D. pag. 231. Resol. Gener. 19 July 1674. Resol. Holl. 25 May 1717.

(3) Plac. 31 Octob. 1563. Cap. 1. Art. 26. G. P. B. 1 D. Col. 805.

3. No ships of war are permitted to be purchased in Holland except by public authority ; such foreign purchasers being otherwise liable to imprisonment.⁽¹⁾

Rights
with re-
spect to
ships of
war.

4. No ships in the service of government are permitted to take in either freight or cargo.⁽²⁾

5. No captains of ships of war may convey in their vessels any kind of merchandize whatever on pain of dismissal from the service and further discretionary punishment.⁽³⁾

6. No arrest or execution can be laid upon any ship of war belonging to the state, nor on any part of its equipment, nor on any arms, ammunition, or government stores, whether naval or military.⁽⁴⁾

7. Ships of war are not permitted to take slaves on board who have run away from their owners.⁽⁵⁾

What might further be observed with regard to the relative duties of the superior and inferior officers of the navy, and of

(1) Resol. Holl. 6 April et 27 Aug. 1651.

(2) Ord. Raad van Staaten, 19 Jan. 1612. Plac. Holl. 24 Jan. 1660. Plac. Zeel. Jan. 1662.

(3) Plac. Gener. 25 Aug. 1651, et 8 March 1652. G. P. B. 1 D. col. 962. 21 Aug. 1656. *ibid.* 2 D. col. 494. 14 Nov. 1670, et 23 Sept. 1682. *ibid.* 3 D. pag. 1371 et 1423.

(4) Resol. 18 Decemb. 1657. in the Resol. of Considerations of De Witt, pag. 424.

(5) Resol. Gener. 4 May 1731. G. P. B. 6 D. pag. 259.

Rights
with re-
spect to
ships of
war.

their crews, would carry us too far from our general subject.⁽¹⁾

SECT. III.

On mer-
cantile and
other ves-
sels.

With respect to vessels belonging to individuals employed in commerce, and the conveyance of merchandize, these have also their peculiar rights.

The principal are the following :—

1. Although a ship from its nature must be considered as moveable property ;⁽²⁾ yet in some respects, it may be classed among immoveables.

With respect to the mode of transfer, when it is sold, or otherwise alienated, and is of the burthen of four lasts and upwards, a *judicial* act of transfer or mortgage must be passed ;⁽³⁾ at *Amsterdam*, however, this act may be done before a notary and witnesses.⁽⁴⁾ Formerly these acts

(1) See the Articles of War relating to the Navy of 24 July 1636. G. P. B. 2 D. col. 187. 16 Sept. 1672. *ibid.* 3 D. pag. 209. 1 Decemb. 1690. *ibid.* 4 D. pag. 202. 8 April 1702. *ibid.* 5 D. pag. 275. as also the general order with respect to the sea-service, dated 11 June 1795.

(2) Voet, ad tit. ff. de rer. div. n. 11.

(3) Ordonn. Van den Veertigsten penning Van de Schepen, van 7 Aug. 1748. G. P. B. 7 D. pag. 1373. Resol. van Gecommitteerde Raaden, 27 Decemb. 1748. *ibid.* pag. 1394.

(4) Resol. Holl. 20 July, 1669. G. P. B. 8 D. pag. 1990.

were subjected to the duty of two and half per cent.⁽¹⁾

On mer-
cantile and
other ves-
sels.

At present according to the new scheme of taxation, this duty has been repealed, and the act of transfer or mortgage, must be written on stamped paper of a high amount.⁽²⁾

2. All ships or vessels employed in inland navigation, must when they are built be measured, before they take in any freight, in order to ascertain the amount to be paid for *tonnage*, *water*, *pleasure*, and *passage* duties, and of this a certificate of admeasurement is given.

When it is proposed to enlarge a vessel already measured and marked, consent must be obtained for this purpose by the shipwright, and the vessel when finished must be again measured, and a fresh certificate obtained, all under the penalty of such fines, as are by the law in this behalf appointed.⁽³⁾

3. Those who advance money for the building of a vessel from the stocks, or furnish their labour for this purpose, do not obtain thereby any lien, or legal mortgage, or right of preference upon the vessel; although the contrary is

(1) Ordonn. 7 Aug. 1748.

(2) Ordonn. op het Middel van't Klein Zegel, 26 Nov. 1805, Art. 62.

(3) Ordonn. op het Passagie-geld, 26 Nov. 1805. Art. 8, 9, 10, 11, 12, 13, 14, 15, 18, 56, 57, 58, et 59.

On mer-
cantile and
other ves-
sels.

the case, with respect to those who furnish money or labour, for the necessary repairs of an old ship.⁽¹⁾

4. The inhabitants of this land, are not at liberty to hire out their vessels to foreign states, for the whale fishery.⁽²⁾

5. All inhabitants of these lands, not being owners of vessels employed in the *small fisheries*, and which ships may be taken by the enemy, are prohibited from purchasing any of them, and bringing them to this country; with power to the owners in case of contravention of this law, to reclaim and seize these ships on their arrival here, as their own property, free from all costs and charges, or compensation whatsoever.⁽³⁾ This law has since been extended to *Busses*, and other vessels employed in the great and herring fisheries and trade.⁽⁴⁾

6. In time of war, the executing of foreign orders for ship building, or the exporting of

(1) De Groot, Inleid. 2 B. 48 D. S. 13. and there Groenewegen in not. V. D. Keessel, Thes. 417. See further, Leyser Medit. ad Pand. Tom. 3. Spec. 159. Med. 1-6.

(2) Plac. Gener. 6 March, 1653—17 March, 1656—19 March, 1661—24 March et 14 Decemb. 1663. G. P. B. 2 D. col. 302, 2639, 2902, et 3087, and of 16 April, 1681. *ibid.* 3 D. pag. 1365.

(3) Plac. Gener. 28 Feb. 1678, et 22 Oct. 1705. G. P. B. 5 D. pag. 1564.

(4) Plac. Gener. 22 May. 1705. G. P. B. 5 D. pag. 1565.

materials for ship building, is entirely prohibited.⁽¹⁾

On mercantile and other vessels.

SECT. IV.

It happens, sometimes, that a person who wishes to build a new vessel, or to purchase an old one, has not sufficient ready money for this purpose, and is therefore obliged to leave the vessel either wholly or in part, as a lien or incumbrance on the vessel; and for this purpose, the vessel in the first place is generally and specially hypothecated, with all her masts, sails, and tackle; and furthermore, the party binds his own person and goods, as an additional security. The Instrument by which this security is effected is termed a *water or byl bond*.⁽²⁾

Byl, or water bonds.

The effect of this special mortgage is, that the holder thereof has a preferent lien upon the vessel for the sum due, wherever the vessel may be, and into whosoever hands she may come;⁽³⁾ and this lien remains, although the terms stipulated in the bond for the instalments may have expired.⁽⁴⁾

(1) See examples thereof in the Gr. Pl. Boek, 7 D. pag. 490, et 9 D. pag. 108, 114, et 123.

(2) For the forms of this instrument see Wassenaar, Pract. Notar. Cap. 9, S. 6. and in the forms of Notarial Acts, No. 75. (Amst. 1776).

(3) Wassenaar, Pract. Notar. Cap. 9. S. 5. Hamerster Statut. van Vriesland, 1 D. pag. 471.

(4) Barels, Advisen over den Koophandel, 1 D. Adv. 75.

*Byl, or
water
bonds.*

In case the ship be lost, or otherwise perish, or if the proceeds in case of sale be not found sufficient, the party still remains liable for the remainder of the debt by virtue of the *general mortgage*. However, these *water* or *byl bonds* have no preference over a later *bottomry bond*; the reason whereof is simply this, that the person who subsequently advances his money upon bottomry, thereby contributes to preserve the ship, and to place the security of the first mortgagee in a better state.⁽¹⁾ These *byl bonds* must be passed judicially; but at *Amsterdam*, the act may be done before a notary and witnesses.⁽²⁾

SECT. V.

Bottomry. As in the case of the purchase of a ship, the security for the purchase-money is given by a *byl* or *water bond*: so, in the case of the mortgage of a ship, the deed of security is termed a *bottomry bond*.^{(3)*}

By *bottomry*, we understand a contract whereby a certain sum of money is advanced by way of

(1) L. 5. et 6. ff. qui pot. in pign. Holl. Cons 3 D. Cons. 56. Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 16. pag. 512. Barels, d. l. pag. 399.

(2) See above, S. 3. n. 1.

(3) See a form of this in Wassenaar, Pract. Notar. Cap. 9. S. 4. Verwer, Nederl. Zeerechten, pag. 254 et 255.

* Vide Voet ad tit. ff. de Nautico fœnore. l. 22. tit. 1.

loan on the security or pledge of the ship itself, **Bottomry.** and with this proviso, that in case the ship perish, or be lost, the party advancing the money shall have no right of recourse against the borrower, or any right to recover further than against the proceeds of such parts of the ship as may have been saved; and that, in the event of the safe arrival of the vessel, or her wilful loss by the borrower, the lender is entitled to the repayment of the sum advanced with a certain high interest.⁽¹⁾ This contract is not considered as unlawful or usurious; for the stipulation for higher than legal interest is not to be viewed as a mere recompense for the loan or advance of money, but as a compensation of the risk which the lender runs of losing both principal and interest by the loss of the vessel.⁽²⁾

This species of contract was known to the Romans under the name of *fœnus nauticum*, or *pecunia trajectitia*; although our contract of bottomry does not agree with it in every respect.⁽³⁾

From the nature of the contract, its privileges can properly arise in those cases only in which it takes place in a foreign port; but custom has

(1) Pothier, *Traité du Contrat de Prêt à la grosse aventure*, Art. 1. S. 1.

(2) Pothier, d. 1. S. 2. Emerigon, *Traité des Contrats à la grosse aventure*, Chap. 1. Sect. 2. S. 3.

(3) Van Der Keessel, *Thes.* 556 et 557.

Bottomry, introduced its use in the country to which the vessel belongs, provided it be made with the consent of the greater part of the owners.⁽¹⁾

The hypothecation of ship and goods under the pretended name of *bottomry*, but in which the lender is to run no risk of loss by sea, is considered as a mere loan, and, as such, entitled to none of the privileges of this species of contract.⁽²⁾

When the master of a vessel is under the necessity, during the voyage, of putting into a port where his owner does not reside, and has no correspondent, he is entitled to take up money on bottomry for the necessary repairs of the vessel, for which the owner, from whom he is considered to have an implied or tacit power for this purpose, is liable; but if the owner reside there, then his express consent is necessary.⁽³⁾ When the ship is saved, but has suffered damage, the whole sum advanced on bottomry must be repaid with interest, according to the rule. *Bottomry bears no average*, which rule holds

(1) Handv. van Amsterdam, 2 D. pag. 538, n. 21. et pag. 541. Waarsch. Holl. 5 Feb. 1665.

(2) Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 16. pag. 515. seq. Barels, Adviesen over den Koophandel, 1 D. Adv. 71. pag. 382.

(3) Roseboom, Recueil der Keuren van Amsterdam, Tit. 52. J. Weskett, Complete Digest of the Theory, and Practice of Insurance, Art. Bottomry, n. 3. et 6.

even in the case when the bottomry is only on the goods.⁽¹⁾ Bottomry.

By the *danger of the sea*, which the lender on bottomry takes upon himself, is understood all disasters occasioned by storms or bad weather, or by the enemy, or by the unskilfulness or carelessness of the master, provided he does not deviate from his course ⁽²⁾ A subject of a neutral power, who has lent money upon bottomry, for the necessary repairs of the ship, retains his right of mortgage upon the ship, although she may be captured by the enemy during the voyage.⁽³⁾ When the ship is lost, but some part of her tackle is preserved, either by floating ashore, or by salvage, the creditor on bottomry is preferent on their proceeds, so far as they extend, since bottomry is on the security of the *ship's keel and tackle*; but when these are insufficient, the borrower is not liable further; for the common language of a bottomry bond is, "*In so far as this bottom brings so much on shore.*"⁽⁴⁾

(1) Bynkershoek, Quæst. Jur. Priv. Lib. 3. Cap. 16. pag. 514. V. D. Keessel. Thes. 558 et 559.

(2) V. D. Keessel. Thes. 560.

(3) C. Asser, Dissert. de jure, quod est civi gentis in bello mediæ, cui pro pecuniâ trajectitiâ navis est hypothecæ obligata, in ipsam navim, quæ in itinere, cujus causâ contractus initus est, ab hoste capiatur. (L. B. 1799).

(4) Verwer, Zeerechten, pag. 254. Bynkershoek, Quæst. Jur. Priv. L. 3. Cap. 16. pag. 409.

Bottomry. With respect to the preference of bottomry debts, it is to be observed,

1. That they have the same privilege as a debt for which any moveable property has been pledged, and given into the possession of the creditor.

2. That such a debt being necessarily contracted for the preservation of the ship, is preferable to an older *byl bond*, and that a later bottomry bond takes precedence of an older one,⁽¹⁾ unless several bottomry bonds have been executed within a few days of each other, in which case they are held concurrent, and share *pro rata*.⁽²⁾

3. That debts afterwards contracted for the preservation of the ship, as salvage and the like, rank before debts on bottomry.⁽³⁾

4. That the owner, having paid the salvage, and such preferent debts, is preferent to the holder of a bottomry bond, for the amount, even without a cession of action.⁽⁴⁾

5. That bottomry, upon certain particular goods, is preferent to bottomry upon goods in general.⁽⁵⁾

(1) Arg. L. 5 et 6. ff. qui pot. in pign. . Loenius, Decis, et Observ. Cas. 127.

(2) Handv. van Amsterdam, 2 D. pag. 538.

(3) L. 6. S. 1. qui pot. in pign. Verwer, Zeerechten, S. 22 et 23.

(4) Verwer, d. 1.

(5) Barels, Adviesen over den Koophandel, 1 D. Adv. 66. pag. 364.

6. That the *consignee* of goods, being in pos- **Bottomry.**
session of the bill of lading, and having, upon
the faith thereof, accepted bills of exchange, or
paid charges, is preferent to the holder of a bot-
tomry bond.⁽¹⁾

The amount of profit or interest to be paid on
bottomry varies in proportion to the degree of
risk which is supposed to be incurred by the
lender.⁽²⁾

(1) Handv. van Amsterdam, 2 D. pag. 538.

(2) Roccus, van Schepen en Vragtgelden, n. 137. seq. pag 75.
seq. Pothier, du Prêt à la grosse aventure, Art. 2. S. 4.

CHAPTER IV.

Of Ship-owners, Masters, and Mariners.

SECT. I.

Rights of
part-
owners.

By a ship-owner we understand a person who builds a ship at his own cost, or who acquires the right of property therein by purchase, and with the view of employing her on freight. Frequently several persons unite to purchase or build a vessel, in common, as part owners thereof.

The rights and obligations of part owners, both with regard to each other, and to third persons respectively may be deduced from what we have before observed, under the head of *Company or Partnership*,⁽¹⁾ as well also as from the tenor of the contract which is entered into in this matter, and which is called the *Partnership Deed (Reeder Cedul)*. Very frequently the partners nominate one from among them to conduct the affairs of the partnership, as respects the vessel, and who is termed the book-keeper. His power is generally defined by the agreement, but where it is silent in this respect, then recourse is had to the law of *factors and agents, (institores)*. Each of the partners, in propor-

(1) See above, page 570-580.

tion to his interest in the vessel, is liable for the engagements of the managing partner.⁽¹⁾ This managing partner is also bound, at the end of each voyage, to render an account to his *co-partners*.⁽²⁾ Each partner is bound to continue in the partnership till the vessel has completed her voyage, unless,

Rights of
part-
owners.

1. The majority of the partners chuse to alter the destination of the vessel.

2. Or unless the master, being himself a part owner, be dismissed by the others.

3. Or unless one of the part owners die.

4. Or become bankrupt.⁽³⁾

In the joint ownership of a vessel there are also these special points to be noticed :

1. The owners, whose shares amount together to more than one-half of the vessel, may sell the same on the joint account.⁽⁴⁾

2. In like manner they may also charter the vessel for freight, and take up money on bottomry, for the fitting out of the vessel, so as to bind the owners who dissent to the extent of their shares or interest ; or, if they advance the

(1) De Groot, Inleid. 3 B. 1 D. S. 31. Voet, ad tit. ff. de instit. act. n. 2.

(2) Handv. Van Amsterdam, 1ste Vervolg, pag. 119.

(3) G. F. Von Martens, Grundrisz des Handelsrechts, 3 B. 4 Abschn. S. 157.

(4) Holl. Cons. 6 D. 2 Stuk. Cons. 51. pag. 431.

Rights of
part-
owners.

money from their own funds, they are entitled to deduct it from the shares of the others.⁽¹⁾

3. In case the master is also a part owner, and he alone, or together with others, possesses more than one-half of the vessel, he may, in conjunction with them, charter the vessel for a reasonable freight, so as to bind the interest of the others who do not consent.⁽²⁾

SECT. II.

Respective
rights of
masters
and
owners.

The master is bound to conform to the orders and instructions which he receives from the owners. Further, it is his duty to use all due diligence, attention, and seamanship, in the voyage out and home; and, especially for this purpose, he is bound, in the first place, on undertaking the charge of the ship, and before he takes in the cargo, to examine her, and to report to the owners any defects he may find, and to have them repaired.

2. To look to the loading of the vessel, and to take care that she be not overloaded.

3. Not to carry any goods on his own account, not even in the cabin, without the permission of the owners.

4. Not to leave the ship without necessity, and not to stay on shore all night.

(1) V. D. Keessel, Thes. 709.

(2) V. D. Keessel, Thes. 710.

5. To sail with the first fair wind.
6. Not to deviate from the course prescribed for him, or enter another port without necessity.
7. Not to quit convoy designedly.
8. To take in a pilot where necessary, and give over to him the charge of taking the vessel into harbour.
9. In cases of doubt or serious difficulty and importance, to hold a council with the ship's company, and to act according to their opinion.
10. To give notice to the owners or their agents of all particular occurrences.
11. To keep, or cause the mate to keep, a proper log book.
12. And lastly, to take all possible care for the safety of the ship and cargo.⁽¹⁾ The master is answerable to the owners for all damage occasioned to the ship, by his want of good faith, or by gross neglect of duty. In the event of his being in want of money in a foreign port, he may, according to the exigency of the case, either sell the goods of the owners, or take up money on bottomry; but he may not sell the vessel itself, without the consent of the owners.⁽²⁾ The master is not at liberty to take on board,

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rights of
masters
and
owners.

(1) G. F. Von Martens, *Grundrisz des Handelsrechts*, 3 B. 5 Abschn. S. 161. et 162.

(2) Plac. 31 Oct. 1563. Tit. 2. Art. 12. De Groot, *Inleid.* 2 B. 5 D. S. 16 et 48 D. S. 5. 3 B. 20 D. S. 47. et 23 D. S. 4. *Voe tad tit. ff. de exerc. act. n. 3.*

Respective
rights of
masters
and
owners.

without the express consent of his owners, goods or merchandize prohibited to be imported, at the place of his destination, nor, in any other way, by his misconduct, prejudice the vessel; and in such cases he is liable to them for all damages.⁽¹⁾ The owners can, by no act of the master, unless done with their authority, be further bound than to the value of their respective shares or interest in the vessel.⁽²⁾ The voyage being completed, the master is bound to render a proper account to his owners, who, on their part, are bound to receive and liquidate the same, and to pay him the balance,⁽³⁾ without, however, being further liable to the master, than the amount of their shares.⁽⁴⁾

SECT. III.

Rights of
the master
and
freighters.

It often happens, that the owners of a vessel do not freight her themselves, but let it out to others for this purpose; from which contract various rights and obligations arise between the master and the freighters, which, in all cases, must be first consulted, and followed; this contract is termed a *charter party*.⁽⁵⁾ The master

(1) Voet, ad d. t. n. 7. Van Der Keessel, Thes. 696.

(2) De Groot, Inleid. 3 B. 1 D. S. 32. n. 42-44.

(3) De Groot, Inl. 3 B. 23 D. S. 5. Van Glins, Zeeregten, pag. 16. seqq. Voet, ad tit. ff. de exerc. act. n. 8.

(4) De Groot, Inleid. 3 B. 20 D. S. 48. Barels, Adviesen over den Koophandel, 1 D. Adv. 6.

(5) Pothier, Traité des Contrats de Louages Maritimes.

gives to the freighter a written acknowledgment of the goods sent on board, specifying the nature of the articles, their respective marks and numbers, the place of their destination, the name of the freighter and shipper, and frequently also of the person to whom they are shipped or consigned, and the sum conditioned to be paid for freight.

Rights of
the master
and
freighters.

This instrument is termed a bill of lading (*cognoscement*). A master, whose vessel is chartered here, to fetch freight from abroad, and who is prevented there, by arrest, made under the local authority, from so doing, or who is not provided with a freight there by the merchant, has nevertheless the right to demand the *entire* freight.⁽¹⁾ But if a vessel, being already in foreign parts, is chartered there, to take in freight in some other and foreign port, and, on her arrival there, is prevented by the local authority from so taking in freight, without the fault of the merchant, the master, in such case, is only entitled to *half* freight.⁽²⁾ A ship, lying in any of our ports, and being here prevented, by the local authority, from undertaking the projected voyage, the contract between the master and the freighter or charterer, is thereby dissolved, and they are mutually released from their en-

(1) Plac. 31 Octob. 1563. Tit. 2. Art. 2. Consulaat van de Zee, Kap. 81.

(2) Plac. 1563. Tit. 2. Art. 3.

Rights of
the master
and
freighters.

gagements.⁽¹⁾ If the merchant be not ready, at the limited time, to put the goods on board, he may oblige the master to wait fifteen days, provided he pays him the demurrage; and if he is then not ready, or not willing to load the vessel, he must pay the master the stipulated freight, and also the demurrage;⁽²⁾ of which demurrage the crew are entitled to a fourth part.⁽³⁾

The master must make good to the freighter all damage occasioned by any defect of the vessel or by leakage, or bad stowing, and the like. But he is not bound to do so, in the case wherein he declares with two or more of the ship's company, under oath, that the damage was occasioned to the goods, by an unforeseen accident. The master, however, is bound to take good care of the cargo, and may recover thereout any extraordinary expenses or charges he has been put to in this respect.⁽⁴⁾ The master must be provided with good tackle for the purposes of lading and unlading, and he must exhibit these to the merchant, otherwise he is liable in damages.⁽⁵⁾ The master is liable for any diminution in the quantity of, or damage done

(1) Plac. 1563, Tit. 2, Art. 4.

(2) Plac. *ibid.* Art. 5. Verwer, *Nederl. Zeerechten*, pag. 69.

(3) De Groot, *Inleid.* 3 B. 29 D. S. 6.

(4) Plac. *ibid.* Art. 6. Roccus, *van Schepen en Vragtgelden*, Art. 69. pag. 95. *Consulaat van de Zee*, Kap. 61. *seqq.* pag. 75. *seqq.*

(5) Plac. *ibid.* Art. 7.

to, the goods, within the vessel, occasioned by his fault, or that of his ship's company; and this is estimated at the price which these goods would have brought at the place of their destination. But if such diminution or damage has been occasioned by other circumstances, as by spoiling or leaking, melting, or by overlading of the ship, on the part of the merchant, and without any fault of the master, or ship's company, the loss falls on the merchant. If the vessel, by being overladed, is too deep in the water, so that it becomes necessary to unload part of the cargo, the merchant to whom such goods belong must bear the loss, when the master or his ship's company are not in fault.⁽¹⁾

Rights of
the master
and
freighters.

When a vessel suffers shipwreck, the master and crew are bound to use all possible exertions to save and secure the cargo, and, if possible, to repair the ship, and carry on the cargo to its place of destination; but if the ship is past repair, the master must hire another vessel, and therewith perform his voyage; in both of which cases the master is entitled to the entire freight,^{(2)*} without any deduction for salvage.⁽³⁾

(1) De Groot, Inleid. Art. 8, 9, et 11.

(2) Plac. 1563. Tit. 3. Art. 3.

(3) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 24. pag. 722.
V. D. Keessel, Thes. 681.

* See page 657 infra.

Rights of
the master
and
freighters.

The ship, having arrived at her port of discharge, must be unloaded within fifteen days, except in the case of particular obstacles or difficulty.⁽¹⁾

If a question arises as to who is the owner of the goods, or any arrest is laid on them, the holder of the bill of lading applies to the judge for leave to land and warehouse the goods, pending the question; or even to sell them, if they are in danger of being spoiled, whether this danger arises from the perishable nature of the goods themselves, or from their having been previously damaged. In like manner, as the consignee is entitled to demand the landing and delivery of the goods, so is the master to demand payment of the freight, for the security of which he has the benefit of tacit mortgage (*legal hypothek*), and a right to retain the goods.⁽²⁾

SECT. IV.

Respective
rights of
the passen-
gers and
master.

The passengers, that is, persons who, on payment of a certain sum, take their passage on board the vessel, must find their own provisions, unless they make an agreement with the master to be found in meat and drink; which is generally the case; but even should there be

(1) Plac. 1563. Tit. 2. Art. 13.

(2) Plac. d. Art. 13. V. D. Keessel, Thea. 682, 683, et 684.
See above p. 175.

no such agreement, the master is nevertheless bound, in case of necessity, to supply them at all times with what is necessary for their support on a reasonable compensation. On the other hand, the passengers are bound, in a similar case, to assist the master from their own private stock, so far as they can spare it, on his paying for it; and, in cases of urgent necessity, to lend a hand in the working of the vessel.⁽¹⁾ They are bound, on the first notice from the master, to repair on board, and when the ship is ready to sail not to leave it. If they do, the master is at liberty to set sail, and demand, notwithstanding, the full passage money. The master is not bound, nor indeed at liberty, to go out of his course for the purpose of landing the passengers. With respect to the baggage which they carry with them, the master is only answerable when he has taken charge of and stowed it, or when any damage has been occasioned thereto by the fault of him or his crew.⁽²⁾

Respective rights of the passengers and master.

SECT. V.

The rights and duties of the crew, with respect to the master, are the same as those of servants to their master, in so far as the laws have introduced no special regulations on this

Respective rights of the master and ship's company.

(1) G. F. Von Martens, *Grundriss des Handels-rechts*, 3 B. 8 Abschn. S. 181.

(2) Martens, *ibid.* S. 182.

Respective
rights of
the master
and ship's
company.

head.⁽¹⁾ Any one having engaged himself as a sailor or mariner, his name is entered on the muster roll of the ship. A sailor having engaged with two masters, the first engagement is valid,⁽²⁾ and any master who engages with a sailor whom he knows to have been previously hired by another, forfeits double the hire or wages.⁽³⁾

All those who have engaged themselves to serve on board any vessel must, upon notice by the master, repair on board within twenty-four hours after, with their chest and clothing, in order to assist in ballasting and loading the vessel, and making her ready for sea, or the master may hire others in their place, although they still remain bound by their engagement.⁽⁴⁾

Sailors, when once engaged, are not at liberty to quit the vessel on account of danger or bad news from home, without leave of the master; but, on the contrary, are bound to perform the voyage. Those who act otherwise forfeit their pay, and are further liable in damages, and even punishable as deserters if necessary.⁽⁵⁾

A sailor is not at liberty to quit the ship with-

(1) Grundriss des Handels-rechts, 3 B. 6. Abschn. S. 165.

(2) Plac. 31 Oct. 1563. Tit. 2. Art. 3.

(3) Plac. d. Art. 3. Voet, ad tit. ff. de priv. del. n. 3.

(4) Ordonn. Rotterd. 1721. Art. 186 et 187 ; and other maritime laws.

(5) Plac. 1563. Tit. 2. Art. 1 et 2.

out the master's leave, and must go on board again on being ordered ; if he does not, he forfeits his pay.⁽¹⁾

Respective
rights of
the master
and ship's
company.

A sailor having entered himself as an able seaman, and being found otherwise, forfeits his pay, and is further subject to discretionary punishment.⁽²⁾

The master is bound to furnish his crew with victuals and drink three times a day.⁽³⁾ Formerly the crew were permitted to take on board certain small articles of merchandize, as a *venture* on their own account, and free of freight ; but since the exemption from the duties on exports and imports in this respect has been repealed, this privilege has fallen into disuse.⁽⁴⁾ The crew must assist the master in all matters relating to the ship, and also defend her against enemies and pirates, and in every respect yield implicit obedience to the master, who is authorized to inflict on the disobedient both verbal and corporal punishment as a master may on his servant.⁽⁵⁾ The punishments on board a ship consist generally of a forfeiture of a part of the

(1) Plac. d. l. Art. 4. V. D. Keessel, Thes. 691.

(2) Plac. 1563. Tit. 5. Art. 7. Regtsg. Observ. 1 D. Obs. 87. V. D. Keessel, Thes. 690.

(3) Plac. d. l. Tit. 2. Art. 10.

(4) De Groot, Inleid. 3 B. 20 D. S. 25-30. Plac. 22 Febr. 1657. G. P. B. 2 D. pag. 2468. Resol. 21 Febr. 1671. G. P. B. 3 D. pag. 1270. Verwer, Zeerechten, pag. 86 et 87.

(5) Plac. 1563. Tit. 5. Art. 1.

Respective
rights of
the master
and ship's
company..

pay of the offender, of light corporal chastisement, and the like;⁽¹⁾ but for serious offences he is put in irons, and on coming on shore he is delivered into the hands of justice.⁽²⁾ The master is bound, so far as his means permit, to take care of such of the crew as are sick, and especially of those who have fallen sick on board, and to continue to them their full pay; but he is not bound to retain in his service those who have rendered themselves incapable to do their duty by fighting, drunkenness, or intemperate and violent conduct.⁽³⁾

In the event of one of the crew dying, either a natural death, or in the service of the vessel, his heirs are entitled to the whole of the pay due to him, deducting the cost of burying him.⁽⁴⁾

If the master, by reason of war or pirates, &c. dare not prosecute the voyage, he is at liberty to discharge his crew on payment of one-fourth of the sum stipulated for the voyage.⁽⁵⁾ But an arbitrary discharge on the part of the master, is no more permitted than it is to the sailor to quit the vessel without leave.⁽⁶⁾ With respect to the hiring of sailors, there is this distinction between

(1) Plac. d. Art. 1 et 2.

(2) Plac. d. Art. 2, 4, 5 et 6, and the notes of Van Glin, thereon.

(3) De Groot, Inleid. 3 B. 20 D. S. 43.

(4) De Groot, d. l. S. 44 et 45. V. D. Keessel, Thes. 695.

(5) Plac. 1563. Tit. 2. Art. 9.

(6) Plac. ibid. Art. 13.

it and an hiring or engagement for any other service—that the master, although he alter the voyage, may compel them to remain in the service, provided he makes a reasonable addition to their wages.⁽¹⁾ In case of shipwreck, if the vessel and cargo be entirely lost, the crew lose their wages; but when any part of the tackle or furniture is saved, they are entitled to be paid thereout their wages, and also to a liberal salvage.⁽²⁾

Respective
rights of
the master
and ship's
company.

The voyage being completed, and the ship unladen, the master is bound to give the crew their discharge, and to pay them their wages without delay; and in default thereof, he is liable in damages.⁽³⁾

(1) De Groot, d. l. S. 39. V. D. Keessel, Thes. 693.

(2) De Groot, d. l. S. 42. V. D. Keessel, Thes. 694.

(3) Van Glins, Zeerechten, pag. 37.

CHAPTER V.

Of Average and Damage at Sea.

SECT. I.

Average.

As there exists between the owners, the freighters, the master and crew, and passengers, who risk their lives or property in one and the same vessel, a certain kind of community or partnership,⁽¹⁾ it follows therefrom, that the damage suffered during the voyage, through unforeseen accident, either by the ship or goods, must be borne in common. To this damage, the name of *average* is given. This, again, is divided into *common average*, and *great or gross average*.⁽²⁾

SECT. II.

Common average.

The common, or usual average, is confined to the merchandise on board the vessel, and does not extend to the ship itself;⁽³⁾ and the practice in respect of this average is, that in case

(1) De Groot, Inleid. 3 B. 29 D. S. 1 et 8.

(2) Many disputes have arisen as to the derivation of this word. The opinion most generally received is that of Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 24. pag. 718, who derives it from the word *averagia*, made use of in modern latin for *damage at sea*.

(3) Verwer, Zeerechten, pag. 223.

the vessel is laden with goods for account of different *merchants* or *freighters*, one of the conditions of the bill of lading on the part of the master is, that each shall pay him a certain percentage on this head—for example, ten per cent. on the freight—to make good this common average; and in case the *entire vessel is freighted by one merchant*, and there is no special covenant in the charter-party on this head, this average is borne, in the proportion of two-thirds by the freighter, and one-third by the master.⁽¹⁾

Common
average.

Under this common average are included—pilotage, light-house and beacon money, lighterage, harbour duties, &c.⁽²⁾

Besides this *common average*, there is also a *special* or *particular average*, which concerns, 1st, either the ship alone; for example, damage occasioned to the ship by overlading her, or by neglect of the master, or when any part of her tackle or furniture is lost, broken, carried away, or destroyed by bad weather, or other accident, all which falls exclusively on the master and owners.⁽³⁾ Or this special average, again, may affect only certain of the shippers or freighters; as for instance, if certain particular goods on

(1) Verwer, d. l. pag. 116-121. et pag. 272 et 273.

(2) Verwer, d. l.

(3) De Groot, Inleid. 3 B. 29 D. S. 14. Voet, ad tit. ff. ad Leg. Rhod. de jact. n. 10. V. D. Keessel, Thes. 790, 791, et 792.

Common
average.

board are spoiled or damaged, or are, from their nature, subject to certain particular duties; all this is to be borne by the owners of these goods alone, and not by all the shippers jointly.⁽¹⁾

SECT. III.

Gross
average.

By *gross average* is understood all that loss or damage which is voluntarily done to a part of the ship or cargo for the preservation of the remainder, or to avoid greater and probable damage.⁽²⁾

This average is borne both by ship and cargo.

SECT. IV.

Jetsam.

The casting of part of the cargo overboard, in order to lighten the vessel, in the case of a storm, or of her being chased by the enemy or by pirates, is one of the chief heads of gross average, as is also the damage thereby occasioned to the rest of the cargo. To bring this damage within gross average, it is necessary, 1st., that it was occasioned through *necessity*. If, therefore, a vessel, having sailed after the war had already broken out, afterwards, through fear of the enemy, although not actually chased, puts into a port for safety, and remains there waiting for convoy, neither the extraordinary costs and

(1) G. F. Von Martens, *Grundriss des Handelsrechts*, 3 B. 9 Abschn. S. 184.

(2) Ordonn. Rotterd. 1721. Art. 83.

charges, nor the crew's wages, are considered as Jetsam. average,⁽¹⁾ which would be the case if the vessel, being already at sea, had there received the first intelligence of the war, or being ordered to sail with convoy, had missed it, and her voyage had been thereby delayed.⁽²⁾ In order to prove the actual necessity which in these cases will give title to gross average, the master, before he proceeds to throwing the goods overboard, or cutting away the masts or rigging, must consult with the merchant or his factor, if on board, or the principal of the ship's company, and follow the opinion of the majority, in default of which he himself is liable in damages; and on coming on shore, the master must declare under oath that the goods were cast overboard through necessity, in conformity with the general opinion of the ship's company.⁽³⁾

2ndly. It is furthermore necessary that the casting of the goods overboard has actually been the means of saving the ship from capture or perishing. If, therefore, a vessel, in the hope of escape from any imminent peril or danger, has thrown overboard part of her cargo, but, notwithstanding this effort does not escape this

(1) Bynkershoek, Quæst Jur. Priv. Lib. 4. Cap. 25. pag. 734, seqq.

(2) V. D. Keessel, Thes. 783.

(3) De Groot, Inl. 3 B. 29 D. S. 10. Van Glins Zeerechten, pag. 69. seqq. Roccus, van Schepen en Vragtgelden, pag. 122. seqq. V. D. Keessel, Thes. 785.

Jetsam.

danger, but is shortly afterwards lost, this case does not come under the head of average, but each person retains such portion of his own goods as is saved, and must abide by his loss.⁽¹⁾ But should the vessel escape the danger, and afterwards be lost by another accident, that part of the cargo that is saved, provided it be of considerable value, must bear its share of the first damage, except that the freight of the goods saved must be first paid, and the salvage be reckoned under average.⁽²⁾

The loss occasioned with respect to the goods thrown overboard, is not only to be compensated under average, but also the damage thereby occasioned to the other part of the cargo.⁽³⁾

SECT. V.

How, by whom, and on what articles averages are to be borne.

The damage or loss, in gross average, must be borne—

1. By the owners of the ship who contribute therein, so far either as the value of the ship or the amount of the freight extends, in case the latter exceeds the former.⁽⁴⁾

(1) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 24. pag. 721. seq.

(2) V. D. Keessel, Thes. 786.

(3) Ordonn. Rott. 1721. Art. 85. Pothier, Traité des Avaries, Sect. 1. Art. 2.

(4) V. D. Keessel, Thes. 788.

2. By the owners of the goods saved, to the extent of their value. With respect to the mode of ascertaining this value, the practice is, that the goods, if half the voyage has been performed, must be valued at so much as they might have produced at the place of their destination; but in case the voyage has not been half performed, then they are valued at their original cost price.⁽¹⁾

How, by whom, and on what articles averages are to be borne.

3. By the owners themselves of the goods thus thrown overboard, according to the value of the goods, since, were it otherwise, they would be in a better condition than the owners of the rest of the cargo, which would not be just.⁽²⁾

4. By the passengers, with respect to the value of their clothes, and whatever other things they carry with them. Though this is not extended to the ship's company.

Among the things for which, or by which, average must be borne, are comprehended not only articles of merchandise, but also clothing, gold, silver, jewels, and every thing that has been put on board, in coffers or otherwise, provided, previously to their being thrown overboard, due notice be given to the master if the articles are of great value, otherwise they are

(1) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 21. pag. 698.

(2) Voet ad. tit. ff. ad Leg. Rhod. de jact. n. '6.

How, by whom, and on what articles averages are to be borne.

valued only according to the external appearances of the boxes or coffers containing them.⁽¹⁾

Goods laden on the upper deck do not come under average if thrown overboard. However, goods stowed between the orlop deck and the gallows of a ship coming from the *Baltic*, when thrown over in case of necessity, come under average at *Amsterdam*.⁽²⁾

As by the throwing of goods overboard in bad weather, in order to lighten the vessel, the owner is not considered to have abandoned or lost his right of property:⁽³⁾ so it follows therefrom, that these goods, being afterwards recovered, by swimmers, divers, fishermen, or others, may be claimed by their owner, on payment of the costs incurred in their recovery.⁽⁴⁾

On the remaining part of the cargo, which must contribute in average, the master of the vessel which has suffered damage, has not only the right of *retention*, but also the benefit of a *tacit mortgage*; and this right is also extended to the owners of the goods which have been cast overboard, or otherwise lost or damaged, in cases wherein average takes place. However,

(1) De Groot, *Inl.* 3 B. 29 D. S. 11, et 13. V. D. Keessel, *Thes.* 789.

(2) V. D. Keessel, *Thes.* 792. *Handv. Van Amsterdam*, 2 D. pag. 657. col. 1. in med.

(3) See pag. 122, *supra*.

(4) Pothier, *Traité des Avaries*, Sect. 1. Art. 5.

no one under the head of average, is liable beyond the ship and goods, which must bear the average, so that by abandoning these he is freed from further claim.⁽¹⁾

How, by whom, and on what articles averages are to be borne.

The action arising from claims in average should, from its being of a perfectly similar nature to that against underwriters or insurers, be considered as superannuated within the same short period.⁽²⁾ The master must enter in his *log-book*, with all possible accuracy, every case of average as it occurs ; and in the first port which he enters, give a circumstantial account thereof to the judge of the Admiralty court there, or to the consul of his nation, and take a certified copy of this act and declaration ; and he must give notice of these cases of average, as soon as possible, to his owners and freighters, and, in particular, to the Admiralty board at the place of his destination ; and on his arrival there, he must, in conjunction with the principal of his ship's company, verify and confirm, by oath, his log-book and declaration. The statement of average is then made out, generally by a sworn committee, and the proportion to be borne by each of those who are bound to contribute in average settled and determined, by a kind of sentence, by com-

(1) V. D. Keessel, Thes. 793.

(2) Voet, ad tit. ff. ad Leg. Rhod. de jact. n. 11. in fine. Prof. V. D. Keessel, however, is of a different opinion. Thes. 795.

How, by whom, and on what articles averages are to be borne.

Other cases of average.

missaries of sea causes, to which the name of *Despache* is given.⁽¹⁾

SECT. VI.

Besides the casting of goods overboard, there are other cases wherein *gross average* on ship and goods takes place.⁽²⁾

1. When any goods have been given or promised to an enemy or pirate, in order to ransom, liberate, or obtain re-possession of the vessel or cargo.⁽³⁾

2. When the cables, or masts, or part of the rigging are cut away or cast overboard, in order to save the ship and cargo.⁽⁴⁾ Under this head are included the cases when holes are cut in the floor of the vessel, for the purpose of letting the water which she has shipped run freely to the pump; the cutting or slipping of cables, when there is not sufficient time to weigh the anchor and sail with the convoy. The cutting away of the boat is also brought into average, when it

(1) G. F. Von. Martens, *Grundriss des Handels-rechts*, 3 B. 9 Abschn. S. 187 et 188.

(2) Pothier, d. l. Sect. 2.

(3) Ordonn. Rotterd. 1721. Art. 100. Query, whether the claiming of gross average is just or not when the ships have been captured as enemy's property; and whether it makes any difference in this case if the ships alone, or the ships with their cargoes, or the cargoes alone be condemned?—On this, see P. Sanders' *Treatise on Gross Average*. (Amst. 1802).

(4) De Groot, *Inleid.* 3 B. 29 D. S. 10.

could easily have been secured in the ship, but otherwise not.⁽¹⁾

Other
cases of
average.

3. The costs of hiring lighters to save the ship and cargo, also come into *gross average*; but if they are merely employed to get the vessel afloat, one-third of this charge is borne by the ship, and the remaining two-thirds by the cargo. If the goods, in case of storm or otherwise, in order to lighten the vessel, have been put on board a lighter, and such lighter is swamped or lost, this loss comes into *gross average*.⁽²⁾

4. The damage sustained by one of the crew being wounded or maimed in the ordinary service of the ship, is a charge against the master or owner; but when such an accident is occasioned by the vessel having been attacked by the enemy, or by pirates, or by being fired into for not *sakuting*, the surgeon's charges, as well as the compensation to the man wounded, come under *gross average*.⁽³⁾

5. The costs of unlading part of the cargo of a vessel, in order to enable her to enter the harbour or river, are also reckoned as *gross average*.⁽⁴⁾

(1) Ordonn. Rotterd. 1721. Art. 86-90. Van Der Keessel, Thes. 784.

(2) De Groot, Inleid. 2 B. 29 D. S. 16.

(3) De Groot, d. l. S. 9. V. D. Keessel, Thes. 782.

(4) L. 4. pr. ff. ad Leg. Rhod. de jact.

SECT. VII.

Ships getting foul of, or running down each other.

Among the damages suffered by vessels at sea, those especially which are occasioned by their *getting foul of, or running down each other (aan of overzeiling)*, deserve to be noticed. If a vessel, either under sail, or lying at anchor, is run foul of or run down by another, the party by whose wickedness or carelessness this is occasioned, is alone liable for the damages.⁽¹⁾ But if both parties are equally in fault, each bears his own loss.⁽²⁾ But the respective masters are each answerable to the owner of the goods on board for the damage thus occasioned. If it is not clear by whose fault the damage has been occasioned, and therefore it does not appear that they could have avoided each other, the damage is borne by moieties,⁽³⁾ and the circumstance of their being *home or foreign traders* makes no difference.⁽⁴⁾ Under this head of damage is comprehended not only all that which is suffered by the vessel, but also by the cargo; and though one of the ships should be in ballast, the other ship and the goods therein are both answerable for the damage done to the

(1) Plac. 31 Octob. 1563. Tit. 4. Art. 1.

(2) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 22. p. 705. seqq. V. D. Keessel, Thes. 816.

(3) Plac. 1563. d. Art. 1. De Groot, Inleid, 38 D. S. 16.

(4) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 19.

ship in ballast.⁽¹⁾ This damage, besides, is not confined simply to the immediate injury occasioned by being run foul of or run down, but is extended also to the further and other consequences of the accident, as, for instance, when the vessel is thereby so disabled as to be prevented from keeping up with the convoy, and is afterwards captured by privateers.⁽²⁾

Ships getting foul of, or running down each other.

Although the law has expressly declared that each vessel is to bear half the damages, it is yet a question whether this half is to be taken *arithmetically*, that is, pound for pound, or *geometrically*, that is, proportionably to the respective value of each ship. For the geometrical proportion many weighty reasons may be adduced.⁽³⁾ Yet the arithmetical proportion seems to prevail in practice.⁽⁴⁾ If my vessel strikes against the bow of yours, which is lying at anchor or in moorings, and my vessel is also damaged, I must not only pay half the damage suffered by yours, but bear all my own.⁽⁵⁾ And

(1) Bynkershoek, d. l. Cap. 18. pag. 675. seqq. V. D. Keessel, Thes. 813.

(2) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 22. pag. 708. V. D. Keessel, Thes. 814.

(3) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 20. pag. 689. seqq.

(4) Neostadius, supr. cur. Decis. 48 et 49. Coren, Obs. 40 et 41.

(5) De Groot, Inleid. 3 B. 38 D. S. 17. Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 21. pag. 701.

Ships getting foul of, or running down each other.

this is also the case, although the vessel lying at anchor had not eased out her cable ; unless when called upon to do so by the master of the vessel that was drifting, she could have done it without danger, but refused so to do.⁽¹⁾

In the roads of the Texel, however, the practice is, that ships drifting towards each other, through storms or bad weather, may cut each other's cables, in order to save themselves, without being liable in damages.⁽²⁾

If a ship, drifting upon the cables of another lying at anchor, cuts these cables, whereby the last-mentioned vessel is wrecked, she is liable in the whole of the loss.⁽³⁾ If two vessels, lying at anchor, drift upon each other without parting their cables, and thereby damage each other, the damage is borne in moieties.⁽⁴⁾ A vessel under sail, running foul of another lying at anchor or at moorings, has no claim for compensation with regard to the damage suffered by herself, but is, nevertheless, liable for half that sustained by the other. Provided the master of the latter declare on oath that he was not in

(1) Bynkershoek, d. l. Cap. 22. pag. 704.

(2) Barels, Adviesen over den Koophandel, 1 D. Adv. 31, 32, et 33.

(3) V. D. Keessel. Thea. 819.

(4) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 18. pag. 673. seq.

fault; but if he can be proved to have been in fault, then his ship is liable for the whole of the damages.⁽¹⁾

Ships getting foul of, or running down each other.

(1) De Groot, Inleid. 3 B. 38 D. V. Keessel, Thes. 821.

CHAPTER VI.

Of Insurance.

SECT. I.

Insurance.

IN order to prevent the disasters to which vessels at sea or their cargoes are liable from storm or the enemy, falling entirely upon one person, the mode of lightening these calamities, by dividing the burthen among different persons, was very early devised, and introduced into practice in this country, under the name of the contract of *insurance*; and various laws and regulations, both universal and local, have been made on this subject.⁽¹⁾ By the term *insurance*,

(1) Plac. van de Zeerechten van Koning Philips, 31 Octob. 1563. Tit. 7. Plac. 20 Jan. 1570. Ordonn. te Amsterdam, 10 March, 1744.—Handv. 2 D. pag. 662. seqq.—27 April, 1745. ibid. 3 D. pag. 1666.—30 Jan. 1756, Handv. 2 de Verv. pag. 89. seqq.—Ordonn. te Rotterdam, 28 Jan. 1721.—Art. 23-82.—Ordonn. te Middelburg, 30 Sept. 1600, and the Ampliation of the same, 4 Feb. 1719. Among the writers who have expressly treated of this subject, the following deserve to be noticed: Pothier, *Traité du Contrat d'Assurance*, in his *Traité du Droit*, Tom. 3. pag. 1-75.—B. M. Emerigon, *Traité des Assurances et des Contrats à la Grosse*. (Marseil. 1783. 2 vols. in 4to).—J. Weskett, *Complete Digest of the Theory and Practice of Insurance*, (Lon. 1781. in fol.)—J. A. Park, *System of the Law of Marine Insurances*, (Lond. 1800, in 8vo.)—A. Baldasseroni, *delle Assicurazioni Marittime Trattato*. (Firenz. 1786. 3 Tom. in 4to), and others.

is understood, “ a contract, whereby one of the parties takes upon himself the risk of all the accidents to which a certain thing is exposed, and binds himself to the other party to make good to him all the loss or damage that shall happen to this thing, and to save him harmless therefrom, on the condition of receiving a certain sum of money, which the other party engages to give him, in consideration of the risk which he thereby takes upon himself.”⁽¹⁾ Different things may be the subject of insurance ; as, for example, we have insurances of houses and buildings from fire ;⁽²⁾ but this contract chiefly takes place with respect to risk by sea. The party who takes this risk upon himself is termed the insurer ; and he who pays the money to the other, in order to be protected from this risk, is termed the *insured*. The money which is thus paid for this purpose, is called the *premium of insurance* ; the contract between the parties in this matter, and which is reduced into writing, is termed a *policy of insurance*.

Insurance.

SECT. II.

The following are the essential requisites of a contract of insurance :

What things may be the objects of insurance.

(1) This is the accurate definition of Pothier, d. l. Chap. 1. S. 1. n. 2.

(2) V. D. Keessel, Thes. 716.

What
things may
be the
objects of
insurance.

First. A thing capable of being insured.
Among these we may class,

1. The ship itself, or, as it is more usually termed, the hull of the ship, with its masts, spars, standing and running rigging, anchors, cables, cordage, guns, &c.;⁽¹⁾ and on this head it is indifferent whether the vessel be old or new.⁽²⁾

2. All kinds of goods, wares, or merchandize, whether of a perishable nature or otherwise, without exception.⁽³⁾

3. The costs and charges of loading the vessel, and also the premiums paid or to be paid for insurance.⁽⁴⁾

4. The freight to be earned by the vessel.⁽⁵⁾

5. The mariners' wages.⁽⁶⁾

6. The money lent on bottomry of either ship or goods, provided it be clearly expressed in

(1) Ordonn. Amst. Art. 7. Rott. Art. 25. Dordr. Art. 29. Middelb. Art. 4. and Ampl. Art. 3.

(2) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 6. pag. 567.

(3) Ordonn. Rotterd. Art. 25. Dordr. Art. 29. V. D. Kees-
sel. Thes. 721.

(4) Ordonn. Rott. Art. 25. Dordr. Art. 29. Amst. Art. 22. Middelb. Art. 3. et Ampl. Art.

(5) Ordonn. Rott. Art. 26. Dordr. Art. 30. Amst. Art. 15.

(6) Ordonn. Rotterd. Art. 26. Dordr. Art. 30. But these are excepted by the Ordonn. Amsterd. Art. 13. et Middelb. Art. 6.

the policy of insurance,⁽¹⁾ in which case not only all this money so lent on bottomry, but even the goods purchased therewith, and put on board the vessel, are at the risk of the insurers or underwriters,⁽²⁾ with this qualification, however, that an insurance effected on goods, already charged with bottomry to their full value, is void, and such an insurance only covers the excess of value of the goods over the money lent on bottomry on them.⁽³⁾

What things may be the objects of insurance.

7. The money paid for the ransom of persons taken prisoners by the Turks.⁽⁴⁾

8. Every thing that is connected with commerce, navigation, the importing and exporting of goods, and to the voyages, and to whatever proceeds therefrom.⁽⁵⁾

9. The value of the provisions to be consumed on the voyage.⁽⁶⁾

10. And lastly, The profit which may be expected to be derived from a certain transaction

(1) Ordonn. Rott. Art. 26. Dordr. Art. 30. Amst. Art. 19-21. and Ampl. 1756. Art. 21.

(2) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 16. pag. 658 seqq.

(3) Ordonn. Amst. Art. 21. and Ampl. 1756.

(4) Ordonn. Rott. Art. 26. Dordr. Art. 30. Amst. Art. 14.

(5) Ordonn. Rotterd. Art. 26. Dordr. Art. 30.

(6) Ordonn. Middelb. Art. 3. Amst. Art. 7. But we find the contrary in Ordonn. Rotterd. Art. 24. Dordr. Art. 31.

What
things may
be the
objects of
insurance.

or speculation, provided it be valued at a precise sum in the policy.⁽¹⁾

Under the general denomination of goods and merchandize, in policies of insurance, ammunition, or instruments of war, are not considered as included ; nor gold, silver, precious stones, nor jewels, unless they are specifically named in the policy.⁽²⁾ Ships, merchandize, or other property of the enemy, may not be insured.⁽³⁾ In some places, the ship, with all its appurtenances, may be insured for the entire and full value.⁽⁴⁾ In others, only for seven-eighths of the value.⁽⁵⁾ The insurers are not bound to make good the damages or losses when they do not exceed three per cent.⁽⁶⁾

Against barratry on the part of the master, the owners are not at liberty to insure, as they have the appointing of him ; but they may insure against his neglect, as well also as against barratry on the part of the crew, or by such persons as take the command of the vessel provisionally on the death of the original master in foreign parts,

(1) Ordonn. Amst. Art. 17.

(2) Ampl. Ordonn. Middelb. Art. 3. Ordonn. Amst. Art. 10. Rotterd. Art. 41. Dordr. Art. 43.

(3) Bynkershoek, Quæst. Jur. Publ. Lib. 1. Cap. 21.

(4) Ordonn. Amst. Art. 7. Dordr. Art. 34.

(5) Ordonn. Rotterd. Art. 31.

(6) Ordonn. Rott. Art. 44. Dordr. Art. 46. Amst. Art. 22 et 34.

or who, for other reasons, are appointed to the command without the knowledge of the owners. This distinction, however, does not apply in the case of freighters or merchants, who may insure themselves against barratry or carelessness on the part of the master or crew.⁽¹⁾

What things may be the objects of insurance.

The life of a man may not be the subject of insurance, although his civil liberty may.⁽²⁾

SECT. III.

Secondly. With regard to persons who are qualified to *insure or act as underwriters*. Insurance-brokers⁽³⁾ may, neither by themselves nor by others, act as underwriters or insurers.⁽⁴⁾ This is also prohibited to the commissaries and secretary of the chamber of insurance.⁽⁵⁾ In order to effect an insurance for another person, no special power is necessary; a general power is sufficient for this purpose: for which reason, factors are at liberty to insure by virtue of that cha-

What persons may underwrite, or insure.

(1) Ordonn. Rotterd. Art. 42 et 43. Dordr. Art. 44 and 45. Bynkershoek, Quæst. Jur. Priv. Lib. 4, Cap. 4. p. 553. seqq.

(2) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 1. pag. 526, seq. Pothier, Cap. 3. Sect. 1. Art. 3.

(3) With respect to their duties and their charge for Brokerage, see Ordonn. Middelb. Art. 9. et 10. Amst. Art. 38. et 39. Rott. Art. 76-79. Dordr. Art. 76-79, et 81.

(4) Ordonn. Rott. Art. 80. Amst. Art. 39.

(5) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 26. n. 2. pag. 739.

What persons may underwrite, or insure.

racter.⁽¹⁾ A policy of insurance may be subscribed or underwritten by several persons, and even at different times; and each is severally liable for the loss or damage, in proportion to the sum underwrote by him.⁽²⁾ They are consequently never liable for the deficiency of any of the other co-underwriters in case of insolvency; but the party insuring is at liberty to secure himself in such case by a fresh insurance to that amount,⁽³⁾ as co-underwriters or insurers are not considered in law as co-debtors (*correi debendi*). The party insured is at liberty to release some, and hold the others bound, in which case he himself runs the risk of the party released.⁽⁴⁾

SECT. IV.

For what risk an insurance may be effected.

Thirdly. *With regard to the nature of the risk or danger to which the thing insured may be exposed.*

This danger must be uncertain, and unknown to both the contracting parties; therefore, an insurance effected with the knowledge of one of the parties, either that the goods insured had already arrived safe at their destined port, or, on

(1) Bynkershoek, d. l. Cap. 1. pag. 524.

(2) Ordon. Amst. Art. 24. Rotterd. Art. 59 et 70. Dordr. Art. 61 et 72.

(3) V. D. Keessel. Thes. 764.

(4) V. D. Keessel. d. l.

the contrary, that they were lost, is wholly void;⁽¹⁾ nay, it is even sufficient to avoid the policy in this case, if the party insuring had the *means* of knowing, at the time, this loss; unless he, or those who effected the insurance on his part, declare under oath that they had no knowledge of this fact;⁽²⁾ which oath, however, is only admitted at some places in that species of insurance which is termed insurance *upon good or bad news*.⁽³⁾ However, the underwriter is still at liberty to prove, if he can, that the party insuring was aware, at the time, of the loss,⁽⁴⁾ which fact being established, the party, besides losing his action, is punishable criminally.⁽⁵⁾

For what risk an insurance may be effected.

We may insure goods or vessels already at sea, provided this circumstance, and the time when the vessel set sail, be mentioned in the policy.⁽⁶⁾ Under the *risk of the sea* is comprehended all disasters arising from wind, storms, or bad weather; but not those occasioned by the ignorance of the master or ship's company;⁽⁷⁾ nor the damage occasioned to the ship or goods by an internal defect of the vessel.⁽⁸⁾

(1) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 26. n. 6.

(2) Ordonn. Amst. Art. 12.

(3) Ordonn. Rotterd. Art. 35-37. Dordrecht. Art. 38 et 39.

(4) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 16. pag. 653.

(5) Ordonn. Rotterd. Art. 39 et 40. Dordrecht. Art. 42.

(6) V. D. Keessel, Thes. 725, 726, and 727.

(7) Barels, Adviesen over den Koophandel, 1 D. Com. 13.

(8) V. D. Keessel, Thes. 759.

SECT. V.

Limitation
of the sum
to be un-
derwritten
by each
insurer.

Fourthly. *Next with respect to the sum which the underwriter engages to pay, in case the property insured perishes or suffers damage.* This sum is most usually limited in the policy; but the underwriters may bind themselves to pay the value according to an appraisement to be made thereof.⁽¹⁾ This sum, however, must not exceed the real value of the goods, but, on the contrary, may be below it.⁽²⁾ When the amount insured is found to exceed the true value of the goods, the underwriters are not liable further than in proportion to the sum set against their respective names, to make good the real loss sustained, either by the destruction of, or damage suffered by, the goods in question.⁽³⁾

SECT. VI.

Premium.

Fifthly. *The Premium of Insurance.*

Although this ought to be in proportion to the extent of the risk which the underwriter takes upon himself, yet the stipulation in the policy, to pay and receive a certain fixed sum in this respect, creates such a binding obligation between the parties that the underwriter is not

(1) Pothier, Chap. 1. Sect. 2. Art. 3. S. 1. n. 75.

(2) De Groot, Inleid. 3 B. 24 D. S. 4. n. 7 et 8. Bynkershoek, Qæst. Jur. Priv. Lib. 4. Cap. 6. pag. 569.

(3) Ordonn. Rotterd. Art. 70. Amst. Art. 23. Bynkershoek. d. 1. pag. 570.

at liberty afterwards to complain that he has Premium. been prejudiced on this head.⁽¹⁾ When the goods insured are not put on board, or a less quantity in value than is expressed in the policy, or the amount of the sum insured exceeds the true value of the goods, the premium may be demanded back (*restorno*), leaving, however, to the underwriter *one half per cent.* for his trouble ; but if the goods have already been put on board of lighters and barges, for the purpose of conveying them to the vessel, and then the intended voyage is stopped, the deduction in this case by the underwriter, on the return of the premium, is *one per cent.*⁽²⁾ If in the same policy an insurance is effected, not only on the outward bound cargo, but also on the return cargo (*de retour*), the party insured may recover back the premium paid on this account, if the ship return without a cargo.⁽³⁾ All premiums of insurance must be paid at the time of signing the policy ; and if the underwriter give credit to the broker, he has his remedy only against him, unless the party insured had himself not paid the broker the premium.⁽⁴⁾ The underwriter has no lien or right of mortgage on the goods insured for the premium ; but the broker

(1) Bynkershoek, d. l. Lib. 4. Cap. 5. pag. 564.

(2) Ordonn. Amst. Art. 23. Verzan. van Casuspos. Cas. 20.

(3) Barels, Adviesen over den. Koophandel. 1 D. Adv. 19.

(4) Ordonn. Amst. Art. 37.

Premium. who has paid the premium has a lien on the policy.⁽¹⁾ If a contract of insurance be entered into in time of peace, for a very moderate premium, without any clause therein contained providing for the case of war, and afterwards a war should unexpectedly break out, it is held, for very good reasons, that in such case the underwriter will not be entitled to demand an additional premium.⁽²⁾

SECT. VII.

Policy of insurance.

*Sixthly. As regards the mutual consent of the contracting parties, contained in a written policy. Although this transaction is properly one of those which are perfect by mutual consent, and is valid, although the premium be not yet paid;⁽³⁾ the law nevertheless provides, with respect to this species of contract, that the written memorandums of agreement respecting insurance, (*hand polissen*), shall not be good beyond fourteen days, and that within this time the agreement shall be drawn out, on a proper stamped policy.⁽⁴⁾ In a contract of insurance, all such covenants or conditions may be inserted as are*

(1) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 2. pag. 538. Ordonn. Amst. Art. 39.

(2) Pothier, Chap. 1. Sect. 2. Art. 3. S. 2. n. 83. Emerigon, Chap. 3. Sect. 4. Tom. 1. pag. 70. et suiv.

(3) V. D. Keessel, Thea. 713 et 729.

(4) Publ. Holl. 13 Nov. Nov. 1773. G.P.B. 9 D. pag. 134. Ordonn. op't Klein Zegel. 28 Nov. 1805. Art. 74.

not forbidden by law ; and these must be strictly observed and fulfilled ;⁽¹⁾ conditions forbidden by law, are, if inserted in the contract, of no force, even although the parties should have expressly waived the law in this respect.⁽²⁾ The name of the vessel must be inserted in the policy, at least it must sufficiently appear therein ;⁽³⁾ a change of the name of the vessel made *bona fide*, does not vitiate or affect the policy, provided no doubt can thereby arise as to its being the same ship.⁽⁴⁾ By the clause, circumjacent places, (*circumjacentien*), inserted in most policies, is understood not only the place, where the goods are put on board, but also the outlets, rivers, and harbours ; and further, all the buoys, beacons, and the like signs, until the ship has passed them ; but no places more distant.⁽⁵⁾ Several policies may be underwritten for one and the same insurance ; but if, taken together, the sums severally underwritten exceed the value of the goods insured, the first in date remain in force, and the return of the premium (*restorno*) falls on the later policy.⁽⁶⁾

Policy of insurance.

(1) V. D. Keessel, Thes. 730 et 731.

(2) V. D. Keessel, Thes. 732.

(3) Bynkershoek, Quæst Jur Priv. Lib. 4. Cap. 12. pag. 618. seqq.

(4) Bynkershoek, d. l. Cap. 11. pag. 610-612.

(5) Ordonn. Amst. Art. 4. Bynkershoek, d. l. Lib. 4. Cap. 6. pag. 571. seq. et Cap. 10. pag. 601-603.

(6) Ordonn. Amst. Art. 24.

SECT. VIII.

Obligations on the part of the insured.

When the goods insured are lost or damaged, and thus the case arises in which the contract of assurance comes into operation, then various obligations also arise, both on the part of the insurer and the person insured, which deserve to be shortly noticed ; and first, with respect to those on the side of the party insured, as claiming compensation.

1. He is bound, by means of a broker, or some other public person—for example, at *Amsterdam*, by the secretary and messenger of the Chamber of Insurance—immediately, and without delay, to give notice to the underwriter of the loss, and, if required, to give him copies of all the intelligence he has received respecting the vessel or goods, and the disasters, arrests, or damage which have happened to them. On failure of this, the party insured is liable for all costs and damages occasioned thereby.⁽¹⁾

2. If the ship or cargo be wholly lost, or the damage is so great, that the underwriter is liable as for a total loss, the other party, before he claims for a total loss, is bound to *abandon* the ship or goods, and to renounce all his right or interest therein, in favour of the under-

(1) De Groot, Inleid. 3 B. 24 D. S. 14. Ordonn. Amst. 1744. Art. 36 et 1756. Art. 36.

writers.⁽¹⁾ This abandonment is done by a notice in writing, served upon the underwriter, by the messenger of the board for maritime affairs.⁽²⁾ If the ship be lost or damaged beyond repair, or if the goods be spoiled, taken, or otherwise for a certainty lost to the owners, beyond hope of recovery, the abandonment may take place immediately.⁽³⁾ But if there is yet a hope of recovering either the ship or goods, as in the case of either being laid under arrest; this abandonment may yet be delayed, for some time, after notice to the underwriter of what has happened; for instance, *six months* for cases within Europe, and the Barbary Coast, and the Canary Islands, and *twelve months* for the countries beyond these limits; but in such case the underwriter is bound, at the request of the other party, to give security.⁽⁴⁾ If the vessel in which the goods insured are laden be detained in a foreign port, or rendered not sea-worthy, the goods may be put on board another ship, on account of the underwriter, and thence conveyed to the place of their destination;* but if the damage done

Obligations on the part of the insured.

(1) Pothier, Chap. 3. Sect. 1. Art. 1. S. 3. Ordonn. Rott. Art. 60.

(2) Ordonn. Rott. Art. 61.

(3) De Groot, Inleid. 3 B. 24 D. S. 13. Ordonn. Rott. Art. 62. Dordr. Art. 64.

(4) De Groot, d. l. S. 12. Ordonn. Amst. Art. 26. Rott. Art. 64-66. Dordr. Art. 67 et 68. V. D. Keessel, Thes. 755.

Obligations on the part of the insured.

to the vessel be trifling, the party insured must wait the time required for the necessary repairs.⁽¹⁾

3. The party who makes this abandonment, is bound at the same time to make a declaration of all further insurances effected by him, on these goods, and the money he has raised on bottomry upon them.⁽²⁾

4. He is also bound to shew, by sufficient proofs, not only the value of the goods insured, but also the real amount of the damage sustained.⁽³⁾ Although the value of the goods insured, be expressed at a certain sum in the policy, it is not sufficient that the party insured confirm this value by oath, but he must be able to shew by proof *aliunde*, that it is the real value.⁽⁴⁾ The value of the goods lost is taken at their first price, and that of the damaged goods, which have arrived at the place of their destination, at the price which they would have fetched there, had they arrived in an undamaged state, without reckoning the freight, and other charges, all which should have been separately insured.⁽⁵⁾ When the goods arrive partly in a sound and

(1) Ordonn. Amst. Art. 26. Middelb. Art. 15. Rott. Art. 53 et 54. Dordr. Art. 55.

(2) Pothier, Chap. 3. Sec. 1. Art. 1. S. 4.

(3) Pothier, d. l. S. 5.

(4) Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 4. pag. 663-665.

(5) V. D. Keessel, Thes. 739.

partly in a damaged state, in estimating the damage, not only the goods spoiled, but also those uninjured are brought into account, so that the damage is settled at such a *per centage*, as all the goods taken together are diminished in value, and thus the profit on the sound goods is set off against the damage and loss sustained on the others.⁽¹⁾

Obligations on the part of the insured.

SECT. IX.

The obligations on the part of the underwriter consist principally in the following :

Obligations on the part of the underwriter.

1. If the goods insured are totally lost, or may be considered as such, the underwriter is bound on abandonment by the owner, to pay the sum underwritten by him in the policy.⁽²⁾

When no tidings whatever are received of the ship or goods, it must be considered as a total loss, and the party insured is entitled to abandon, after the expiration of a year and six weeks, if the destination of the vessel was not beyond Europe, or the Barbary Coasts, and after two years, if beyond these limits.⁽³⁾

2. If the goods insured are not wholly lost, but only damaged, by one of those disasters the risk whereof the insurer takes upon himself, he

(1) Verzameling van Casus-positien, Cas. 5. pag. 43 seqq.

(2) Pothier, Chap. 3. Sect. 1. Art. 1.

(3) De Groot, Inleid. 3 B. 24 D. S. 10. Ordonn. Rott. Art. 67.

Obligations on the part of the underwriter.

is bound to make good this damage in proportion to the sum which he has underwritten;⁽¹⁾ since by the term *damage*, in the language of insurance, is comprehended not only the destruction, but also the spoiling of the goods.⁽²⁾

The cause by which the destruction or damage of the goods is occasioned, is not confined, in cases of insurance, to disasters by sea, or bad weather; but is extended also to damage by fire, by the enemy, by pirates, arrest by the local authority; also to all that happens to the ship or goods through the barratry or negligence of the master or of the ship's company and others; and furthermore, to every thing, whether contemplated or not, usual or unusual, provided it be comprehended under any general words in the policy.⁽³⁾ It is clear that the underwriter is not liable when the property insured becomes spoiled, diminished in value or damaged, either wholly or in part, in consequence of some intrinsic cause or defect, as is also the case in regard to a vessel having some internal defect.⁽⁴⁾

On the same ground the underwriter also is not liable for the damage occasioned to a Green-

(1) Pothier, Chap. 3. Sect. 1. Art. 3.

(2) Ordonn. Amst. Art. 35. Rott. Art. 70.

(3) De Groot, Inleid. 3 B. 24 D. S. 7. Ordonn. Rott. Art. 42.

(4) V. D. Keessel. Thes. 759.

land whale fisher by the ice, provided the vessel has safely arrived in port.⁽¹⁾ The damage which the underwriter is bound to make good begins to run on his account from the time at which the goods insured are brought on the wharf or quay to be put on board the ship that is to convey them to their port of destination, or placed in lighters or barges for the same purpose; and the damage or risk terminates when the vessel with her apparel has arrived at the destined port, and has there entirely discharged her cargo safe.⁽²⁾

Obligations on the part of the underwriter.

SECT. X.

That the underwriters are in general more ready to receive the premium than to settle the damage, and are very ingenious in devices to avoid the latter, is a remark which was made long before our time.⁽³⁾ Yet the above mentioned exceptions shew that there may be different cases wherein the underwriter may have good grounds of defence against the claims of the other party: it is therefore of importance to notice shortly the principal of these.

Exceptions in favour of underwriters.

1. That the damage for which compensation

(1) Barels, Adviesen over den Koophandel, 1 D. adv. 25. pag. 138.

(2) De Groot, Inleid. 3 B. 24 D. S. 8. Ordonn. Rott. Art. 46 et 47. Amst. Art. 5. Bynkershoek, Quæst. Jur. Priv. Lib. 4. Cap. 2.

(3) Bynkershoek, d. l. Cap. 3. pag. 545.

Exceptions
in favour
of under-
writers.

is claimed has been occasioned not by any external or extrinsic cause, but by some intrinsic defect in the ship or goods themselves,⁽¹⁾ or that it is of so trifling a nature as not properly to fall under the denomination of damage, as for instance, when it does not amount to three per cent. of the value.⁽²⁾

2. That the sum insured exceeds the amount of the interest of the party in the vessel, the consequence of which is that this sum must be reduced to that amount, and should it appear that this excess is the result of fraud in the party, he would thereby even lose altogether his right of action.⁽³⁾

3. That the vessel insured had through the act of the master, though without the knowledge of the owners, deviated from the course mentioned in the policy, since thereby the insurance becomes void.⁽⁴⁾

In the case of an insurance of goods, if the master be guilty of a deviation without the knowledge of the party insured, the underwriters are not thereby released, unless these goods belong to the owners themselves.⁽⁵⁾

(1) Zie hier vooren, bladz. 514 et 522.

(2) V. D. Keessel, Thes. 760.

(3) Pothier, Chap. 3. Sect. 1. Art. 1. S. 6. n. 156.

(4) Barels, Adviesen over den Koophandel, 1 D. adv. 21 pag. 123-125. Ord. Amst. Art. 6 in fin.

(5) Ordonn. Amst. d. l. Bynkershoek Quæst. Jur. Priv. Lib. 4. Cap. 8.

The master, however, remains always personally liable in these cases; and if the underwriter has paid the loss or damage, he may demand cession of action against him from the other party.⁽¹⁾

Exceptions
in favour
of under-
writers.

The party insured is not at liberty to order the master to enter another port than that mentioned in the policy; and in such case, the insurance would become void, and the underwriters be released.⁽²⁾

This order by the person insured to the master to deviate from his course, or knowledge on his part that such is the master's intention, must be proved by the underwriter; and in this case, the oath of the party insured to clear himself is admissible.⁽³⁾

By *deviation*, or altering the course of the vessel, is understood not only the case of the vessel taking an entirely different course, or before reaching her port of destination, entering another port,⁽⁴⁾ but also the case when having passed the port for which the injured goods were destined, without touching thereat, she has pursued her further voyage with her entire cargo, and in this further voyage, is lost.⁽⁵⁾

(1) Ordonn. Rott. Art. 52. Dordr. Art. 54.

(2) De Groot, Inleid. 3 B. 24 D. S. 11. n. 25.

(3) Bynkershoek, d. l. Lib. 4. Cap. 5. pag. 562. seq. Cap. 7. pag. 582. Cap. 8. pag. 585. Cap. 16. pag. 657.

(4) Bynkershoek, d. l. Lib. 4. Cap. 16. pag. 655.

(5) Verzam. Van Casus-Posit. Cas. 12.

Exceptions
in favour
of under-
writers.

4. A change of course occasioned by necessity does not affect the rights of the party insured.⁽¹⁾

5. That the goods having reached their destined port, have not been unladen or put on shore within the proper time, which time at Amsterdam is limited to *twenty-one days*, and at Rotterdam and Dordrecht to *fourteen days*.⁽²⁾

6. That the abandonment has not been made within the proper time.⁽³⁾

In all questions arising out of the subject of insurance, we must in general bear in mind that the contract of insurance is a contract *bonæ fidei*, wherein good faith must prevail, and wherein neither on the part of the insurer nor of the insured, any thing which savours of fraud can be permitted,⁽⁴⁾ in so far that the party who in the transaction is found to have acted *malâ fide* is liable to all costs, damages, and loss of profit, besides being subject to a criminal prosecution.⁽⁵⁾

(1) Bynkershoek, d. 1. Cap. 9. pag. 591. seqq. et pag. 596.

(2) De Groot, Inleid. 3 B. 24 D. S. 9. Ordonn. Amst. Art. 5. Rott. Art. 49. Dordr. Art. 49 et 51.

(3) Zie hier boven, bladz. 656. Pothier, Chap. 3. Sect. 1. Art. 1. S. 6. n. 153.

(4) Pothier, Chap. 3. Sect. 3. Emerigon, Chap. 1. Sect. 5.

(5) De Groot, Inleid. 3 B. 24 D. S. 20. Zurck, in Cod. Bat. voc. assurance, S. 23. n. 3.

SECT. XI.

All disputes in cases of insurance must be decided by the judges appointed for the special purpose. Thus, at Amsterdam, there are *commissaries of insurance* appointed to decide these matters;⁽¹⁾ at Rotterdam and at Dordrecht, there is a *chamber of maritime causes*;⁽²⁾ and their jurisdiction is so exclusive that no prorogation thereof by *certiorari*, or otherwise, lies to any other tribunal; and the special privilege of widows and minors ceases in this respect.⁽³⁾ When the contracting parties have subjected themselves expressly by the policy to the jurisdiction of the chamber, this must be followed; and the underwriters, though residing in different places, are not intitled to be sued in the Court of Holland in the first instance.⁽⁴⁾ From the decision of the commissaries of insurance of Amsterdam, an appeal lies to the bench of magistrates (*collegie Van Schepenen*),⁽⁵⁾ and thence to the Court of Holland.

Manner of
proceeding
in insur-
ance cases.

The action against the underwriters must be brought within *eighteen months*, if the cause of

(1) Ordonn. Amst. Art. 43 et 44. Ordonn. op't Proced. aldaar van 1799. Cap. 1. Art. 4.

(2) Ordonn. Rotterd. Art. 1, 23, et 24. Dordr. Art. 5 et 6.

(3) Nad. Ampl. Instr. van't Hof. van, 1744. Art 8.

(4) Resol. Holl, 12 Julij, 1736. G. P. B. 7 D. pag. 933.

(5) Ordonn. Amst. Art. 49.

Manner of
proceeding
in insur-
ance cases.

action has arisen within Europe or the Barbary coasts; but if beyond these limits, within *three years*, which time must be computed from the day on which the disaster happened.⁽¹⁾ Against the lapse of time, in this respect, no relief should be granted, but for very weighty reasons.⁽²⁾

When it appears in this action that a proper policy has been signed, and also that three months previous notice of the loss has been given to the underwriter (which time is granted him by law, in order to provide for the payment),⁽³⁾ the underwriter is provisionally condemned to pay the sum for which the action is brought, under security to refund, if he should obtain a verdict on the merits.^{(4)*}

If the premium has not been paid by the broker at the time of signing the policy, as by law it ought to be,⁽⁵⁾ the underwriter cannot demand more than the ordinary interest of *four per cent.* on the account.⁽⁶⁾ The underwriters are

(1) De Groot, Inleid. 3 B. 24 D. S. 21. Ordonn. Amst. Art. 30. Rott. Art. 69. Dord. Art. 71.

(2) Bynkershoek, Quest. Jur. Priv. Lib. 4. Cap. 14. pag. 639. seq.

(3) De Groot, Inleid. 3 B. 24 D. S. 13. Ordonn. Amst. Art. 28. Doch te Rotterdam en te Dordrecht is die tijd bepaald op één maand. Ordonn. Rott. Art. 68. Dordr. Art. 70.

(4) Ordonn. Amst. Art. 47.

(5) Zie hier boven, bladz. 653.

(6) V. D. Keessel, Thea. 767.

also bound, on judgment going against them, to pay the amount immediately; and on failure thereof, to pay *eight per cent.* interest from the date of the judgment till payment shall be made.⁽¹⁾

Manner of
proceeding
in insur-
ance cases.

(1) Ordonn. Amst. Art. 50. V. D. Keessel, Thes. 767.

CHAPTER VII.

On Bills of Exchange.

SECT. I.

Origin of
bills of
exchange.

“THE circulation of bills of exchange in commerce is the same as that of the blood in the human body. In like manner as the body is nourished and supported by this circulation, and languishes and perishes when it stops, so commerce ceases to flourish when the circulation of bills of exchange is taken away.”⁽¹⁾ It is not therefore to be considered as a matter of wonder that the origin of bills of exchange is so very ancient, and that we find some traces of it even among the Romans.⁽²⁾ Some writers maintain that bills of exchange derive their origin from *Lombardy*, and that the *Jews* who had settled there were the first who introduced this species of contract into use ; others, again, attribute its invention to the *Florentines*, who, when expelled their own state, settled at *Lyons* and other places. However, there is nothing certain in this matter, save that bills of ex-

(1) Leyser, *Medit. ad pand.* Tom. 7. Spec. 531. *Medit.* 2.

(2) Cicero in *Epist. ad Attic* XII : 24. XV : 15. et *ad div.* II : 17. III : 5.

change were already in use in the fourteenth century.⁽¹⁾

Origin of
bills of
exchange.

With respect to the contract of bills of exchange, we have but few special laws in our country on this head; and of these few, none which may be considered as perfect or complete.⁽²⁾

We must therefore guide ourselves by reasons to be drawn from the special nature of the contract itself, by the authority of the writers who have already treated of the subject, and by the laws of foreign states.⁽³⁾

SECT. II.

By a *contract of exchange* we understand that species of transaction or agreement by which I give you, or bind myself to give you, a certain sum, at a certain place, in exchange for a sum of money, which you bind yourself to cause to be

Bills of
exchange
in general.

(1) G. H. Van Martens, Versuch einer historischen entwicklung des wahren Ursprungs des Wechselrechts. (Gott. 1797.)

(2) Men zie hieromtrent het Aanhangsel van Wisselwetten, agter Heineccius, Wisselregt. pag. 619-639.

(3) Onder de Meest aan te prijzen Schrijvers over dit stuk kan men tellen J. G. Heineccius, Grondbeginselen van het Wisselregt, door K. K. Reitz (Middelb. 1774.)—J. Phoonsen, Wisselstijl tot Amsterdam. (Rott. 1755. 2 Deelen, in 8vo.) R. J. Pothier. Verhand. van het Wisselregt. (Leyd. 1801)—J. Du Puy, l'Art des Lettres de Change (Amst. 1792). J. L. E. Putman, Grundsätze des Wechselrechts. (Leipz. 1795.) en zulks behalven die geenen, welke de Wissel-regten van bijzondere Landen beschreven hebben.

Bills of
exchange
in general.

paid to me at another place.⁽¹⁾ To perfect this contract, and bring it into operation, an instrument is made, which is termed a bill of exchange (*Wisselbrief*), that is, a letter framed in a certain form prescribed by the law, by which you request your correspondent, at a certain place therein-mentioned, to pay to me, or to my order, a certain sum of money, in exchange for a sum of money, or the value thereof, which you have here actually received from me in cash, or in account.^{(2)*}

SECT. III.

Instru-
ments of a
similar
nature.

Besides bills of exchange properly so termed, there are also in commerce other instruments, which resemble bills of exchange in some particulars, but differ from them, however, essentially in others. Of this nature are

1. *Exchange Notes* (*Wissel-biljetten*), by which are understood all such notes of hand or engagements in writing whereby any one binds himself to another, *either* to pay him a certain sum, as the price of a bill of exchange which he has delivered to him, or, *vice versa*, to furnish him with a bill of exchange on a certain place,

(1) Pothier, Inleid. S. 2.

(2) Pothier, d. l. S. 3.

* See also Voet ad ff. tit. de Nautico Foenero l. 22. tit. 2. n. 5.—T.

for the value which he has given for the same.⁽¹⁾ These exchange notes sometimes contain also the words “*to order*,” and may then be negotiated or endorsed as bills of exchange.⁽²⁾

Instruments of a similar nature.

2. *Notes Payable at a certain place*, are those notes in writing whereby I bind myself to pay to you, or your order, a certain sum, at a certain place, by means of my correspondent there, in lieu of the sum or value which I have here received from you, or am to receive.⁽³⁾

3. *Notes Payable to Order*, (*Billietten aan Ordre*), are those whereby any one promises to another to pay something to him or to his order, *i. e.* to whomsoever he may, by an assignment written on the back thereof, make the same payable. They differ from other notes of hand in this, that when they are given to any particular person, a regular assignment is necessary, in order to pass them over in favour of a third person; and that the party thus assigning does not thereby guarantee the payment, as is the case with the act of indorsement; the consequence of which is that there is no limitation to the time of bringing an action on this species of notes so assigned.⁽⁴⁾

(1) Pothier, Inleid. S. 4. et 2 Deel. S. 2—4.

(2) Pothier, 2 Deel. S. 5.-8.

(3) Pothier, 2 Deel. S. 9.

(4) Pothier, 2 Deel, S. 10-16.

Instru-
ments of a
similar
nature.

4. *Notes of Hand, Payable to Bearer, (Billietten aan Toonder)*. These are notes, containing a promise to pay a certain sum to the bearer of the note, without any designation of the original creditor or person who has given the value for the note.⁽¹⁾ Any person, therefore, who is the holder thereof is entitled to demand payment, unless it can be shewn that the party has obtained possession of it *mala fide*.⁽²⁾ If the note be not simply to pay to the *holder* or *bearer*, but to the *lawful holder* or *bearer*, the person presenting the same must shew that he has obtained it by a lawful title.⁽³⁾

5. *Assignations*, that is, such letters whereby I request any one to pay on my account to a third person, who generally is a creditor of mine, a certain sum.⁽⁴⁾ This transaction contains within it a contract of mandate,

1. On the part of the maker of the letter to the person to whom it is addressed to pay the sum in the letter mentioned; and

2. To the person in whose favour the letter is made on the part of the person who makes it, to receive the sum expressed in the letter, and

(1) Pothier, 2 Deel. S. 18.

(2) De Groot, Inleid. 3 B. 5 D. S. 6. V. D. Keessel. Thea. 525.

(3) Bynkershoek, Quæst Jur. Priv. Lib. 2. Cap. 11.

(4) Pothier, 2 Deel. S. 19.

therewith pay the debt due to him, that is, to pay himself.⁽¹⁾

Instru-
ments of a
similar
nature.

These instruments differ in many respects from bills of exchange ; for example, the holder of this letter of transfer is not bound, in case of non-payment by the party to whom it is addressed, to sue him, nor even to apply to him for payment within a limited time. On payment being refused, it is sufficient that the holder return the instrument to his original debtor, in order to his being entitled to demand payment from him of the original debt as he would be if he had never received this order. This transaction is good, though made between persons who live in the same place, whereas bills of exchange are always drawn in one place and made payable in another. However, these instruments, even when accepted, have not the summary privileges of bills of exchange. The maker of one of these instruments is not, in the case of non-payment, liable to be proceeded against in the same manner as the drawer of a bill of exchange. Again, the holder has his remedy solely against the last endorser, and not against any of the prior indorsers, as is the case with regard to bills of exchange.⁽²⁾

6. *Letters of Credit*, whereby a merchant or banker requests his correspondent at another

(1) Pothier, d. l. S. 21. V. D. Keessel, Thes. 841.

(2) Pothier, d. l. S. 23-29. V. D. Keessel, Thes. 838-852.

Instru-
ments of a
similar
nature.

place to advance to the person in the letter named so much as he shall state himself to be in want of.⁽¹⁾

SECT. IV.

Different
kinds of
bills of
exchange.

The bills of exchange in use in commerce, (for those which are termed *dry bills* [*drooge* or *agene wissels*,] from their having no acceptor, and being merely an acknowledgment of a debt by the party who signs them, and a mere undertaking to pay,⁽²⁾ cannot be considered as such), are of different natures.

1. Bills containing the words *value received*, without stating in what this value consists.

2. Bills wherein the nature of this value is expressed, for example, *value received in cash*, or *value received in goods*.

3. Bills containing the words *value in myself*; these are made payable to the order of the drawer himself, who, as soon as the broker has found any one to purchase this bill, indorses it to him in the words *value received from him in cash*, by which indorsement the bill first properly acquires the force of a regular bill of exchange.

4. Bills containing the words *value in account*;

(1) Pothier, d.l. S. 30.

(2) Phoonsen, Wisselstyl, Cap. 35. Heineccius, Wisselregt, 2 Hoofdd. S. 1-6, 20 et 21. Putman, Grundsätze des Wechselrechts, 2-4 Hauptst.

in this case I am bound to set off the money I receive by negotiating this bill against the debt due to me from the drawer.⁽¹⁾

Different kinds of bills of exchange.

5. Bills payable *at sight*, that is, to pay so soon as the holder presents the bill for payment.

6. Bills payable at a certain number of days *after sight*. As to these bills, the time of payment runs from the day that the bill has been presented to the drawer, and been accepted by him.

7. Bills payable at a certain precise day.

8. Bills payable at single, double, or further *usance* (*uso*). By *usance* is understood the time which it is customary, in any particular country, to allow for the payment of bills of exchange.⁽²⁾ For instance, in France the *usance* is by law fixed at thirty days, so that a bill drawn there at *one and a half usance* is payable *forty-five days* after date, for the time of payment is computed from this date, unless the bill contain the words at *so many days after sight*.

9. Bills again are also made payable at certain periods of annual markets.⁽³⁾

(1) According to some ordinances relating to bills of exchange, the expressing in the bill what the value consists of, is necessary ; according to others, it is not. Heineccius, 4 Hoofdd. S. 14. Putman, 2 Hauptst. S. 13.

(2) Phoonsen, Cap. 14. S. 10.

(3) See, with respect to all this, Pothier, 1 Hoofdst. S. 3-11.

SECT. V.

Parties to
a bill of
exchange.

There are generally four parties to a bill of exchange ; three, at least, are necessary :

1. The drawer, who issues the bill.
2. The payee, or person who gives, or undertakes to give, to the drawer the value of the bill, (the remittent).
3. The *drawee*, to whom the bill is addressed, and who is to pay the amount : when he has undertaken to do this, by signing or accepting the bill, he is termed the *acceptor*.
4. The holder, who is to receive the amount of the bill.⁽¹⁾

It may be that the payee, and the holder of the bill when due, are the same person ; and then, in this case, there are but three persons in the transaction.⁽²⁾

Other persons may also enter into or be concerned in the bill, in the course of its negotiation ; for example, *indorsees*, that is, persons to whom the owner of the bill transfers his right by words to that effect, written on the back of the bill, (*indorso*).⁽³⁾ *Strange acceptors*, who accept or undertake to pay, *for the honour* of the

(1) Pothier, 2 Hoofdst. S. 1. Van Der Keessel, Thea. 574.

(2) Pothier, d. l. S. 2-5.

(3) Pothier, d. l. S. 6-8.

drawer, or of one of the indorsers.⁽¹⁾ Securities of the drawer ; this security is termed *aval*.⁽²⁾

SECT. VI.

The following are considered as the essential parts which must enter into the composition of a bill of exchange :

Requisites
of a bill of
exchange.

1. There must be mention made therein of *three* persons ;—of him who draws the bill—of him on whom it is drawn—and of him to whom it is made payable.

2. There must be a drawing on or assignment, or making over from one place to another ; that is, there must be a giving at one place, in order to receive at another.⁽³⁾

3. It is usual to draw the bill payable to a certain person therein named, *or to his order*. When this is omitted, the bill is not transferable to another by mere indorsement.^{(4)*}

4. The time of payment must therein be expressed, for example, *either* at such a day, *or* at

(1) Pothier, d. l. S. 9.

(2) Heineccius, 3 Hoofdd. S. 26. Pothier, 2 Hoofdst. S. 10. et 3 Hoofdst. S. 20.

(3) Pothier, 3 Hoofdst. S. 1. et 4 Hoofdst. S. 6.

(4) Phoonsen, Cap. 9. S. 6. Verzam. van Casus. pos. Cas. 8. pag. 88.

* In this case it loses the privilege of passing by a mere indorsement, and requires the regular form of assignment by the common law.—T.

Requisites
of a bill of
exchange.

sight, or at so many days, or at one or more *usances*.⁽¹⁾

5. The mention of *value received*, with the expression (according to some *ordinances*,) of what this value consists.⁽²⁾ Without this acknowledgment of value received, the instrument would not be a bill of exchange, but a mere assignment, or order to pay.⁽³⁾

6. It is most prudent, in order to prevent forgery, to express the sum for which the bill is drawn, in letters at full length, and not in figures.⁽⁴⁾

The drawer who issues the bill generally sends to the drawee a *letter of advice* thereof; sometimes, however, a merchant draws upon his correspondent, without advice, inserting in the bill the words *pay without further advice*, which is most frequently the case when the sum is not considerable.⁽⁵⁾

Sometimes several originals are made of the same bill, which is termed a *set*, and they are named respectively the *first, second, or third* bill of exchange, (*prima, secunda, tertia*), with the addition of these words, “*the others being unpaid*.”⁽⁶⁾

(1) Pothier, d. 1. S. 3. V. D. Keessel, Thes. 605.

(2) See above, page 674. V. D. Keessel, Thes. 598.

(3) Pothier, d. 1. S. 5.

(4) Pothier, d. 1. S. 6.

(5) Heineccius, 4 Hoofdd. S. 16. Du Puy, Chap. 4. n. 5, et 6. Pothier, d. 1. S. 7.

(6) Pothier, d. 1. S. 8. Phoonsen, Cap. 5. S. 15. et seqq. Verzam. van casus-pos. Cas. 2.

SECT. VII.

The bill being made payable, as is most usual, to a certain person, *or his order*, the owner of the bill has the power to transfer his right therein to another, by nominating, on the back of the bill, another person in his stead to receive payment. This special mode of transfer is termed an *indorsement* (*endossement*), and the person who makes it is named the *indorser* (*endossant*), and he in whose favour it is made, the *indorsee* (*g  endosseerde*).⁽¹⁾

In order to render such an indorsement sufficient to transfer the right in the bill, it is necessary that the indorser acknowledge thereby to have received the value, for example, as follows, *Pay for me, to N. N. value received, or value in account, (Voor mij aan N. N. waarde ontfangen, or waarde in rekening)*. When these words are not inserted, the indorsement contains nothing more than a mere order to the person therein named, or indorsee, to receive payment of the bill, as the mandatory of the indorser, and to be accountable to him for it. Such an indorsee is, therefore, merely authorised to receive the amount of the bill, but not to bring an ac-

(1) Heineccius, 2 Hoofdd. S. 7.

Indorse-
ment.

tion on it in case of non-payment.⁽¹⁾ By different *ordinances* with respect to bills of exchange, it is required that the indorsement should be *dated*, and indorsements in blank are prohibited. However wise or prudent these laws may be, they have not generally been adopted in our country.⁽²⁾

SECT. VIII.

Accept-
ance.

The party on whom a bill is drawn must, when it is presented to him, declare whether he will undertake to pay it or not; if the former, he then writes at the bottom of the bill the word *accepted*, and subjoins his name thereto.⁽³⁾ If a bill is drawn, payable some days after sight, and the drawee, on its being presented for acceptance, writes thereon the word *seen* (*gezien*), this is held as an acceptance: but should this not be his intention, he should then use the words, *seen without acceptance*.⁽⁴⁾ The acceptance must be pure, and unqualified with any proviso or condition being annexed; and also for the precise sum expressed in the bill, and at the same time; on failure in either of these respects, the bill may be protested.⁽⁵⁾ A

(1) Pothier, 2 Hoofdst. S. 7. et 3 Hoofdst. S. 9, et 11.

(2) Pothier, d. l. S. 10. Heineccius, 2 Hoofdd. S. 11.

(3) Pothier, d. l. S. 13. V. D. Keessel, Thes. 618.

(4) Heineccius, 4 Hoofdd. S. 26. Pothier, d. l. S. 15.

(5) Pothier, d. l. S. 17-19.

merchant is bound to accept a bill drawn upon him by his agent, provided it be not drawn in his own name, but in his quality as agent.⁽¹⁾

Accept-
ance.

SECT. IX.

Although it has been a matter of much controversy to what species of transaction the contract of exchange belongs, the point, however, seems very simple; to wit, the giver of the value for the bill (remittent) *buys*, or, perhaps, to speak more accurately, *exchanges* the money which he gives here, or engages to give to the drawer, for the money which the drawer binds himself to cause to be given to him at another place, by means of a bill of exchange on that place.⁽²⁾ As the value of the money at the place where the remittent gives it, and at that place where the payment of the bill is to be made, sometimes differs, according to the abundance or scarcity of remittances to such place, the remittent makes a deduction on this account. This operation is termed *course of exchange* (*wissel cours*).⁽³⁾

Transac-
tion be-
tween the
drawer and
the payee.

From what we have just mentioned, it will be seen that a contract of *sale* or exchange has now

(1) Costum. van Antw. Cap. 55. Art. 1. De Groot, Inleid. 3 B. 13 D. S. 4. Phoonsen, Cap. 10. n. 5.

(2) Du Puy, Chap. 3. S. 13. et suiv. Pothier, 4 Hoofdst. S. 2.

(3) Phoonsen, Cap. 3. Pothier, 4 Hoofdst. S. 3-5.

Transac-
tion be-
tween the
drawer and
the payee.

taken place between the drawer and the remittent, or the giver of the value for the bill; and there next arises between the drawer and drawee a contract of mandate.⁽¹⁾ When the questions which arise with respect to bills of exchange are simplified by being resolved into the nature, the rules, and the consequences of these two constituent contracts of exchange and mandate, we shall seldom fail of arriving at the true conclusion.

SECT. X.

Obliga-
tions of the
Drawer.

From the contract of exchange various rights and obligations arise, of which it is of the greatest consequence to have a clear view. In the first place, on the part of the *drawer*. The chief obligation on his part consists in this: to provide that, by means of a bill of exchange on a certain place, and at a certain time, the money be paid to the remittent, or payee, which he has given him to receive in exchange for the money which he has here received from him.⁽²⁾ From the nature of this primary obligation, it follows, that the drawer is bound,

1. To deliver to the remittent or payee the bill, on his giving the value, unless he has given him credit for this value, until, for example, it shall appear that the bill has been accepted, for

(1) Pothier, d. l. S. 42, et suiv.

(2) Pothier, 4 Hoofdst. S. 9. Van Der Koessel, Thes. 584.

in that case he cannot excuse himself from delivering the bill, even on the ground that the value thereof has not been tendered to him.⁽¹⁾

Obligations of the drawer.

2. The drawer is bound, in the case of a bill drawn payable at a certain date not being accepted, to give security that it shall be paid when due, or otherwise to refund the value received and costs.⁽²⁾

3. To return to the remittent, or his order, what he has received for the bill, whether it be money or goods, if the latter are still in the possession of the drawer.⁽³⁾

4. To indemnify the remittent for all the damage he has sustained by reason of the bills not having been paid when due.⁽⁴⁾ Under this damage is comprehended,

(1.) The interest of the money received from the remittent, reckoning from the day of the protest.

(2.) The costs of the protest.

(3.) The further damages, as the costs of the journey which the party to whom the bill has been given, has made to the place where it was

(1) Pothier, d. l. S. 11 et 12.

(2) Du Puy, Chap. 7. n. 7. et Chap. 10. n. 19. Phoonsen, Cap. 13. S. 7. Heineccius, 6 Hoofdd. S. 4. Pothier, d. l. S. 21.

(3) Pothier, d. l. S. 13 et 19.

(4) Du Puy, Chap. 16. n. 3 et 19. Phoonsen, Cap. 20. n. 2. Heineccius, 6 Hoofdd. S. 4. Pothier, d. l. S. 13.

Obligations of the drawer.

made payable, in order to effect his proposed operation there, but which, because of default in payment of the bill, he has not been able to accomplish.⁽¹⁾ Loss of expected profit or advantage cannot, however, be reckoned under this obligation.⁽²⁾

(4.) *The re-exchange (her wissel)*, that is, the costs which the holder has been put to in consequence of the inconvenience he has suffered by non-payment of the bill, and being obliged to redraw for this sum upon the original drawer, or on some other person, and thereby procure the money necessary for this occasion.⁽³⁾

(5.) All that the remittent is obliged to pay to the party in whose favour he may have indorsed the bill,⁽⁴⁾ since the drawer is equally liable to the endorsers as to the remittent, who are all on an equal footing in this respect with regard to the drawer.⁽⁵⁾

All these obligations are incurred by the drawer, so soon as the value of the bill has been given to him by the remittent. From this moment he is not at liberty to withdraw from the contract, or revoke his mandate to the

(1) Pothier, d. l. S. 14.

(2) Pothier, *ibid.*

(3) Heineccius, 4 Hoofdd. S. 45. Pothier, d. l. S. 15.

(4) Pothier, d. l. S. 18.

(5) V. D. Keessel, Thes. 593.

drawee;⁽¹⁾ nor can he even, on being sued by the remittent, holder, or indorser, avail himself of the plea that he had not received value for the bill.⁽²⁾

Obligations of the drawer.

SECT. XI.

On the part of the *remittent* or giver of the value for the bill, the principal obligation consists in this, that he give to the drawer the value for the bill delivered to him, and that he actually do this at the time of delivery, without waiting till the bill is accepted, unless it be otherwise agreed.⁽³⁾ If, however, after making the agreement, an extraordinary change should take place in the circumstances, either of the party who has issued the bill, or of him on whom it is drawn, the remittent in such case may demand security for the payment of the bill at maturity.⁽⁴⁾ Again, the remittent is bound to present the bill when due for payment, and in case of the refusal of payment, to make the same appear by due protest, and to give notice of this refusal to the drawer, in order to enable him to take the necessary measures against the drawee.⁽⁵⁾

Obligations of the remittent, or payee.

(1) V. D. Keessel, Thes. 580.

(2) V. D. Keessel, Thes. 599-603.

(3) Pothier, 4 Hoofdst, S. 23. V. D. Keessel, Thes. 583.

(4) Pothier, d. l. V. D. Keessel, Thes. 579.

(5) Pothier, d. l. S. 25. V. D. Keessel, Thes. 581.

Obligations of the remittent, or payee.

This necessity of notice must, however, be confined to the act of presentation *for payment*, and refusal, since the omitting to present the bill *for acceptance* does not deprive the remittent of his remedy against the drawer.⁽¹⁾ In bills drawn *payable at sight*, the remittent is not so strictly limited as to time in presenting the bill; however, he must not, in this case, be guilty of unreasonable neglect or delay.⁽²⁾

SECT. XII.

Obligations between the indorser and indorsee.

As the nature of the transaction between the *indorser* and *indorsee* (as regards indorsements with the words *value received*) is the same as that between the drawer and the remittent, so what we have already observed on this head applies here.⁽³⁾ If, therefore, payment of the bill is refused, and it is protested, the indorsee has not only an action against the last indorser who transferred the bill to him, but he has also the right of action which this last indorser had against the prior indorsers and against the drawer, which actions are considered to have been transferred to him by the indorsement made in his favour.⁽⁴⁾ If the indorsement be not for value received, and thus import no more

(1) Pothier, d. l. S. 26.

(2) V. D. Keessel, Thes. 582.

(3) Pothier, d. l. S. 30.

(4) Pothier, d. l. S. 31. V. D. Keessel, Thes. 592.

than a mere order or mandate to receive,⁽¹⁾ the indorsee is bound to cause the bill to be accepted, and to receive payment of the same when due, and pay it over to the indorser, and in default of acceptance or payment, to cause a protest thereof to be made; but he is not entitled to proceed against the acceptor, drawer, or prior indorsers⁽²⁾ In this case also of an indorsement without the words *value received*, the indorser is at liberty to revoke his indorsement, which he cannot do when he has received the value.⁽³⁾

Obligations between the indorser and indorsee.

SECT. XIII.

The drawee is bound to accept the bill drawn upon him, if he had previously, by letter or otherwise, consented that the maker of the bill should draw upon him; but, without such previous consent, he is not bound to accept a bill which the other party may have chosen without any authority to draw upon him;⁽⁴⁾ but having once accepted the bill he is not at liberty to retreat.⁽⁵⁾

Obligations between the drawer and drawee.

The drawer, on the other hand, is bound,

(1) See above, page 679.

(2) Pothier, d. l. S. 33. et seqq.

(3) Pothier, d. l. S. 41.

(4) Pothier, d. l. S. 43-47. Heineccius, 6 Cap. 6. S. 6. V. D. Keessel, Thes. 616.

(5) Phoonsen, Cap. 10. S. 27. Du Puy, Chap. 10. n. 2-4.

Obligations between the drawer and drawee.

1. To make good to the acceptor, when he, by paying the bill, has satisfied the mandate, the sum he has disbursed on this account,⁽¹⁾ unless this money was previously remitted to him by the drawer, or that the acceptor was already indebted to the drawer to this or a larger amount;⁽²⁾ and,

2. To make good to the acceptor the costs or charges which he has been put to by being sued by the holder of the bill, in consequence of non-payment of the bill, occasioned by the failure of a remittance for that purpose by the drawer.⁽³⁾ For the damage occasioned by any forgery in the bill, no person is liable but the party who has committed the forgery; and if he is not to be found, then the party who has dealt with him must alone bear the loss.⁽⁴⁾ If, therefore, the drawee has paid a bill in which the name of the drawer has been forged, he has no remedy against the drawer; and if the sum has been increased by forgery, he cannot recover beyond the true sum.⁽⁵⁾

(1) V. D. Keessel, Thes. 589.

(2) Pothier, d. l. S. 48.

(3) Pothier, d. l. S. 49.

(4) J. Bondt, Diss. de periculo damni ex falso, in literis cambialibus commissio (L. B. 1788). Van Der Keessel, Thes. 871-873. Pothier, d. l. S. 50-55.

(5) V. D. Keessel et Pothier, d. d. l. l.

SECT. XIV.

When the drawee refuses to accept the bill, or having accepted it refuses to pay, and some other person accepts or pays the bill for the honour of the drawer or of one of the indorsers,⁽¹⁾ such drawer or indorser is bound to repay to him what he has disbursed on this account.⁽²⁾ The party who makes such acceptance is, by virtue of it, bound equally with a drawee who has accepted, to pay; provided the holder transfers to him his right of action: but if the bill has been already protested for non-payment, and is then taken up by a third person, which is termed *supra-protest*, the party so doing has his remedy against the others according to the laws of exchange, and without cession of action.⁽³⁾

Payment
for the ho-
nour of the
drawer or
the in-
dorser.

SECT. XV.

He who accepts a bill of exchange binds himself thereby to pay the sum in the bill mentioned when due, and in default thereof he becomes liable for all the costs and damages.⁽⁴⁾ Under these damages are included those which

Obliga-
tions of the
acceptor.

(1) Du Puy, Chap. 9. n. 5, 6, et 7.

(2) Pothier, d. l. S. 64 et 65. V. D. Keessel, Thes. 607-614.

(3) Roseboom, Recueil, Cap. 50. Art. 10 et 11. Heineccius, 6 Hoofdd. S. 9.

(4) De Groot, Inleid. 3 B. 13 D. S. 9. Heineccius, 4 Hoofdd. S. 38.

Obliga-
tions of the
acceptor.

we stated in respect to the drawer,⁽¹⁾ viz., the interest, the costs of protests, the further damages, and the re-exchange;⁽²⁾ for all this the acceptor is bound to the remittent, and to each indorser, who as holder of the bill, may sue him;⁽³⁾ and he is liable to each *in solidum*, that is, for the whole, nor is he at liberty when the bill is due to evade payment, under the pretence that the drawer has not remitted him the necessary funds, and has since become bankrupt; for this does not in the slightest degree affect the holder of the bill.⁽⁴⁾ On the bill becoming due, a short time is granted to the acceptor, within which to take up the bill, which is termed days of grace, (*respyt-dagen*), and which in Holland is generally six days⁽⁵⁾. On payment of the bill, and at the time when the payment is actually made, and not before, the bill is delivered up to the acceptor.⁽⁶⁾ The payment must be made by the acceptor, at the time in the bill mentioned, and not before, at

(1) See above, p. 683.

(2) Pothier, d. l. S. 68.

(3) Heineccius, 3 Hoofdd. S. 17. et 6 Hoofdd. S. 5.

(4) Pothier, d. l. S. 69-71.

(5) Reitz, Aant. op Heineccius, 2 Hoofdd. S. 14. not. 34 et 35.

(6) V. D. Keessel, Thes. 622.

least not unless with the full consent of the holder.⁽¹⁾ Obligations of the acceptor.

SECT. XVI.

The principal obligation of the holder, consists in this, that on the day when the bill falls due, he present it to the drawee* for payment.⁽²⁾ In case of refusal of payment, he must prove this by a regular act of protest, made by a notary, and give immediate notice thereof to the drawer, in order to his being entitled to recover from him ;⁽³⁾ the holder is not at liberty to make any special agreement, or terms with the acceptor, either for granting him more time, or for remitting part of the debt pending, or after the expiration of the days of grace.⁽⁴⁾ But he may receive a part of the debt, and make a protest for the non-payment of the remainder.⁽⁵⁾ Obligations of the holder.

(1) De Groot, Inleid. 3 B. 13 D. S. 8. Du Puy, Chap. 12. Pothier, 6 Hoofdst, S. 12.

(2) Pothier, 5 Hoofdst. S. 2.

(3) Pothier, d. l. S. 6.

(4) Cost. Van. Antw. Cap. 55. Art. 10. Roseboom, Recueil, Cap. 50. Art. 7. De Groot, Inleid. 3 B. 45 D. S. 7. Reitz, Aanteek. op Heineccius, 3 Hoofdd. S. 17. n. 25.

(5) Phoonsen, Cap. 17. n. 19 et 20. Barels, Adviesen over den Koophandel, 2 D. Adv. 35.

* The original says 'the holder,' which is clearly an error of the press.—T.

SECT. XVII.

Protests of
bills.

The protest is a formal act, done by a notary, in the presence of two witnesses, at the request of the holder of the bill, to prove the refusal of acceptance or payment, on the part of the drawee.⁽¹⁾ The act of protest contains,

1. An application on the part of the holder to the drawee, to accept or pay the bill.

2. A note of the answer, or of the silence, in this respect, of the party to whom this application is made, which latter is considered tantamount to a refusal.

3. A protestation on the part of the holder of the bill, for all the losses and damages, including the expenses of re-exchange, occasioned by this refusal, against whosoever may be liable for the same.⁽²⁾ The protest must be made within the days of grace;⁽³⁾ in default of which the holder loses his remedy against the drawer and indorsers.⁽⁴⁾ The protest must be made even, although the acceptor should abscond, or become a bankrupt.⁽⁵⁾ The protest for non-

(1) Pothier, d. l. S. 7.

(2) Pothier, d. l. S. 8.

(3) V. D. Keessel, Thes. 627, 855 et 856.

(4) De Groot, Inleid. 3 B. 45 D. S. 5. Pothier, d. l. S. 29. Keur van Amsterdam. van 29 Mar. 1661. Handv. 2 D. pag. 543. n. 5.

(5) De Groot, d. l. S. 6. V. D. Keessel, Thes. 8 59.

acceptance, or non-payment of the bill, must be transmitted to the prior indorser, from whom the holder has received the bill, by the first opportunity, or after having given him notice thereof, direct to the drawer.⁽¹⁾

Protests of bills.

SECT. XVIII.

When the bill has been duly protested for non-payment, the holder has his remedy against the drawer, all the prior indorsers, and the acceptor, who are each his debtors, *in solidum*, with the choice against which of these he will proceed,⁽²⁾ He has also the power of recovering this debt, by the *summary mode of proceeding* allowed in cases of bills of exchange, (*Paraat Wissel regt*); that is, to petition the court for a personal order on the party, and an arrest on the goods.⁽³⁾ But, to obtain this summary remedy, it is necessary that there should not exist the least doubt as to the justice of the demand, for in other cases the party must proceed upon the roll,* in order to obtain a final judgment,

Actions and manner of proceeding on a case arising out of a contract of exchange.

(1) De Groot, Inleid, 3 B. 45 D. S. 8. Phoonsen, Cap. 19. n. 3-5.

(2) Du Puy, Chap. 16. n. 1. et suiv. Heineccius, 4 Hoofdd. S. 39.

(3) Keur Van Amst. 20 Jan. 1679. Ordonn. Rott. 24 Aug. 1720. Art. 17, et seqq.

Actions and manner of proceeding on a case arising out of a contract of exchange.

according to the ordinary manner of proceeding.⁽¹⁾

It is clear that when the laws of the place where the action is brought do not admit of this summary mode of proceeding, the action on an unpaid bill of exchange must be brought and conducted in the usual way, by citation and answer, &c., to final judgment for the debt. It is, however, permitted to the plaintiff in this case, to pray an interlocutory or provisional decree for payment, under security, (*Provisie van Namptissement*), on the ground of the defendant's signature, to the bill.⁽²⁾

SECT. XIX.

How a debt due on a bill of exchange is extinguished.

The debt due on a bill of exchange, is extinguished,

1. By payment made to the owner of the bill, or to any person who is empowered or authorized to receive payment on his behalf, whether by means of an indorsement, or by a special act of assignment, if the bill do not contain the words, *or to order*; and it matters not

(1) Keur Van Amsterd. 30 Jan. 1777, in the second continuation of the By-Laws, pag. 85. Ordonn. on the Manner of Proceeding thereof 1779. Cap. 9. Art. 45 et foll.

(2) De Groot Inl. 3 B. 13 D. S. 6. Heineccius, 7 Hoofd. en aldaar de Aanteek. van Reitz.

whether such payment be made by the party originally drawn upon, or by any other person who is pointed out as the person to pay the bill, or by any one named as security for the payment of the bill, or by a party who, after protest, takes the payment upon himself for the honour of the drawer, or indorsers.⁽¹⁾

How a debt due on a bill of exchange is extinguished.

2. The debt is extinguished by an acquittance or release made by the owner of the bill, *either* to the acceptor, by which the drawer and indorsers are at the same time released, unless this acquittance be not a voluntary act, but one of necessity ; as, for instance, if the party has been compelled by the agreement of the majority of the creditors of the acceptor, and obliged to follow their accord and agreement in this respect ; *or* the acquittance may be to the drawer, whereby also the acceptor is freed ; *or*, I may release one of the indorsers, whereby, merely his single and personal obligation is extinguished, but not that of the prior indorsers.⁽²⁾

3. The debt may be extinguished by compensation, or set-off, if the holder of the bill be clearly indebted to the acceptor to that extent, on another account.⁽³⁾ But a debt due to the acceptor, from the remittent or further indorsers,

(1) Pothier, 6 Hoofdst. S. 2-13.

(2) Pothier, d. l. S. 14-22.

(3) Heineccius, 6 Hoofdd. S. 27. not. 39. et S. 30. not. 44.

How a
debt due
on a bill of
exchange
is extin-
guished.

cannot be set off by him, against the holder of the bill.⁽¹⁾

4. The debt may also be extinguished by novation (*schuld vernieuwing*).⁽²⁾

5. By merger (*confusie* or *schuld vermen-
ing*).

6. In some countries also, there is a short period, or prescription, limited for the time of bringing an action on a bill of exchange; but in Holland, this action does not differ from others in this respect.⁽³⁾

SECT. XX.

Conclu-
sion of this
work.

And with this I now close the task, which I had proposed to myself, when I undertook this work. My object was to lay down, as fully and as clearly as possible, the general principles of law and practice, in order thereby to open and smooth the way for those, who, resolved upon a profound and extensive inquiry, aspire to a universal knowledge of law, as a science; which, unless it be founded on fundamental principles, is always vague and uncertain, and never can produce any thing great. If I have in any degree accomplished this object, I shall feel sufficiently recompensed for my labour.

(1) Phoonsen, Cap. 16, S. 17. See also Pothier, d. l. S. 23-27. V. D. Keessel. Thes. 623.

(2) Pothier, d. l. S. 28-35.

(3) Heineccius, 6 Hoofdd. S. 14-21. Pothier, d. l.

I therefore now submit it to the judgment of the discreet reader, and shall conclude with the words of the immortal Grotius.⁽¹⁾ “Quam ego in aliorum sententiis ac scriptis dijudicandis mihi sumsi libertatem, eandem sibi in me sumant omnes eos oro atque obtestor, quorum in manus ista venient. Non illi promptius me monebunt errantem, quam ego monentes sequar.”

Conclu-
sion of this
work.

(1) Grotius de Jur. Bell. ac Pac. in prolegom. n. 16.

THE END.



TITLES OF THE ROMAN LAW,

FROM

THE DIGEST.

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TIT. 1. De justitia et jure.

2. De origine juris.

3. De legibus, &c.

4-1. De constitutionibus Principum.

4-2. De statutis.

5. De statu Hominum.

6. De his qui sui vel alieni Juris sunt.

7. De Adoptionibus, &c.

8. De rerum divisione.

9. De senatoribus.

10. De officio consulis.

11. De-præfecti prætorio.

12. De-Præfecti urbi.

13. De-Quæstoris.

14. De-Prætorum.

15. De-Præfecti Vigilum.

16. De-Proconsulis et Legati.

17. De-Præfecti Augustalis.

18. De-Præsidis.

19. De-Procuratoris Cæsaris.

20. De-Juridici.

21. De-ejus cui mandata est Jurisdictio.

22. De-Adsectorum.

2. Quod quisque juris in alterum statuerit, &c.

3. Si quis jus dicenti.

4. De in jus vocando.

5. Si quis in jus vocatus.

6. In jus vocati ut eant.

7. Ne quis eum qui in jus vocabitur.

8. Qui satis dare cogantur.

9. Si ex noxali causâ.

10. De eo per quem factum.

11. Si quis cautionibus.

12. De feriis et delationibus.

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14. De Pactis.

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TIT. 1. De Postulando.

2. De his qui notantur infamiâ.

3. De-Procuratoribus et defensoribus.

4. Quod cujusque Universitatis nomine.

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TIT. 1. De in integrum restitutionibus.

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TIT. 1. De Jurisdictione.

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3. De dolo malo.
4. De minoribus 25 annis.
5. De capite minutis.
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8. De receptis qui arbitrium.
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- TIT. 1. De Judiciis, et ubi quisque.
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3. De hereditatis petitione.
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- TIT. 1. De rei vindicatione.
2. De Publiciana in rem actione.
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LIB. VII.

- TIT. 1. De Usufructu et quemad.
2. De Usufructu accrescendo.
3. Quando dies Usufructus.
4. Quibus modis Usufructus.
5. De Usufructu earum rerum.
6. Si Usufructus petetur.
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- TIT. 1. De Servitutibus.
2. De servitut. præd. urb.

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4. Communia præd. tam urb. quam rustic.
5. Si Servitus Vindicetur.
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- TIT. 1. Si quadrupes pauperiem.
2. Ad Leg. Aquiliam.
3. De his qui effuderint.
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- TIT. 1. Finium regundorum.
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- TIT. 1. De Interrogationibus in Jure.
2. De quibus rebus ad eund. Judicem.
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- TIT. 1. De condictione furtivâ.
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- TIT. 1. De pignoribus et hypothecis.
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- 2. Ubi Pupillus educari vel morari.**
3. De tutelæ et rationibus distrahend.
4. De contraria tutelæ.
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4. De adimendis vel transferendis legatis.
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TIT. 1. Ad Senat. Consult. Trebellianum.

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3. Ut Legat. seu Fidei-commiss. Servand.

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TIT. 1. De bonorum possessionibus.

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7. De Dotis collatione.
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10. De Carboniano Edicto.
11. De bonorum possess. secund. Tabulas.
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5. Si quid in fraudem Patroni.
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10. De Gradibus et Affinibus.

- 11. Unde Vir et Uxor.
- 12. De Veteranorum et milit. success.
- 13. Quibus non competit bon. possess.
- 14. Ut ex Leg. Senat. Cons. bonor. possess.
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- 17. Ad Senat. Consult. Tertull. et Orphit.

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- TIT. 1. De Manumissionibus.
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- 10. De jure aureorum annulorum.
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- 12. De Liberali Causa.
- 13. Quibus ad Libertatem proclam. non licet.

- 14. Si ingenuus esse dicetur.
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- TIT. 1. De acquirendo rerum dominio.
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- 4. Pro Emptore.
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- 6. Pro Donato.
- 7. Pro Derelicto.
- 8. Pro Legato.
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- 2. De confessis.
- 3. De Cessione bonor.
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- 5. De rebus auctoritate Judicis possid.
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- 7. De Curatore bonis dando.
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- 2. Quorum bonorum.
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- 4. Ne vis fiat ei qui in possess.
- 5. De Tabulis exhibend.
- 6. Ne quid in loco sacro.
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- 8. Ne quid in loco publico vel iter. fiat.

9. De Loco public. fruend.
10. De Via pub. et si quid in ea.
11. De Via et itinere pub. reficiend.
12. De Fluminibus ne quid in flumen.
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14. Ut in flumen pub. navigare liceat.
15. De Ripa muniend.
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18. De Superficiebus.
19. De itinere actuque privato.
20. De Aqua quotidiana et æstiva.
21. De Rivis.
22. De Fonte.
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24. Quod vi aut clam.
25. De Remissionibus.
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 9. De Incendio, Ruina, Naufragio, &c.
 10. De Injuriis, et famosis libellis.
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- 16. *Ad Senat. Cons. Turpelianum.*
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- 23. *De Sententiam Passis.*
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- TIT. 1. *De Appellationibus et Relationibus.*

- 2. *A quibus appell. non licet.*
- 3. *Quis a quo appell.*
- 4. *Quando appell. sit.*
- 5. *De appell. recipiend.*
- 6. *De Libellis dimissoriis.*
- 7. *Nihil innovari appell.*
- 8. *Quæ Sententiæ sine appell.*
- 9. *An per alium causæ appell.*
- 10. *Si Tutor vel Curator.*
- 11. *Eum qui appell.*
- 12. *Apud eum a quo.*
- 13. *Si pendente appell.*
- 14. *De jure Fisci.*
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- TIT. 1. *Ad Municipalem.*
- 2. *De Decurionibus et filiis eor.*
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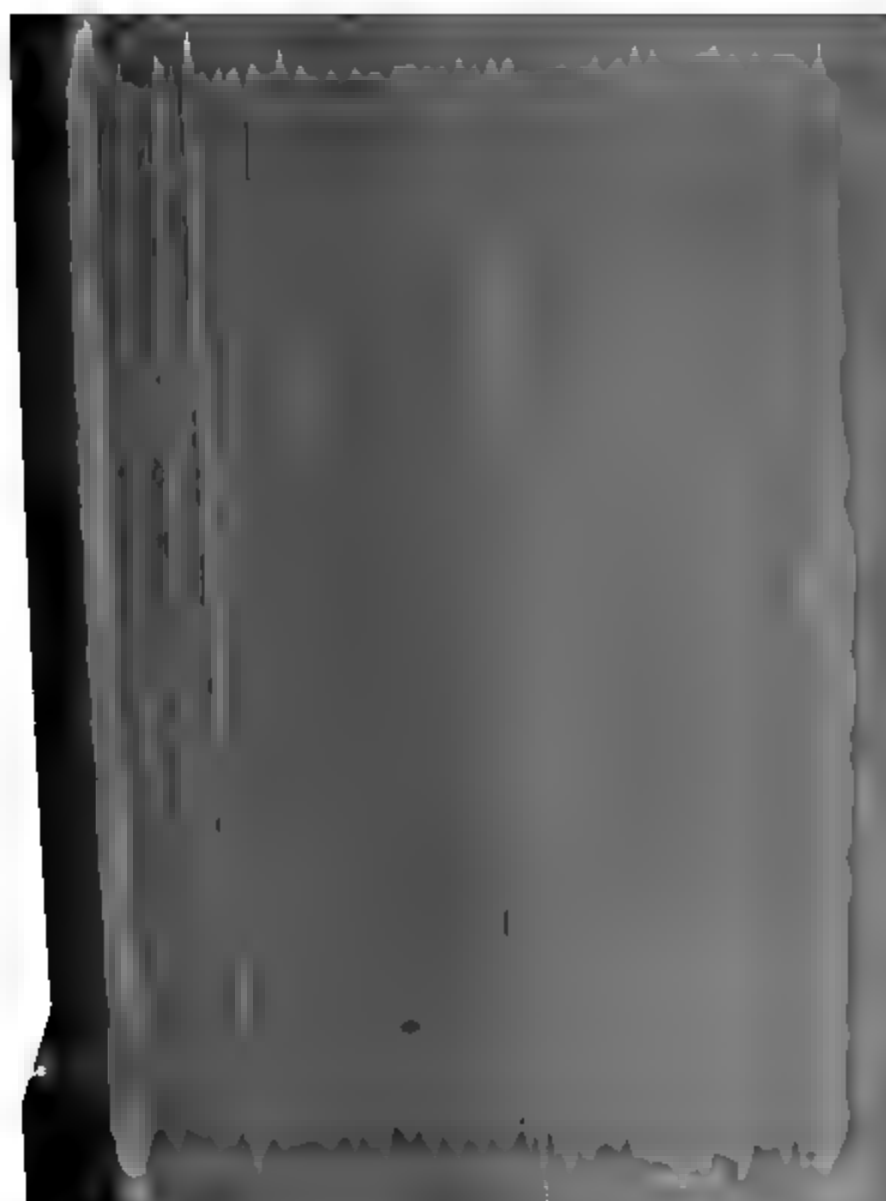
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